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COURT OF APPEALS CASES

In re UTRERA

Docket No. 280531. Submitted June 4, 2008, at Detroit. Decided September 23, 2008, at 9:00 a.m.

Karen Russell petitioned the Macomb Circuit Court, Family Division, to terminate the parental rights of Anne L. Miller to a minor child for whom Russell had been acting as guardian ad litem. The petitioner alleged that the respondent had failed to comply with a court-structured transition from the child's limited guardianship placement plan, which resulted in a disruption of the parent-child relationship. The court, Tracey A. Yokich, J., adjourned the matter five times before asserting jurisdiction over the child, approximately one year after the initial petition was filed. The court ultimately terminated the respondent's parental rights pursuant to MCL 712A.19b(3)(d), for noncompliance with the transition plan, and MCL 712A.19b(3)(j), after finding a reasonable likelihood that the child would be harmed if returned to the respondent. The respondent appealed.

The Court of Appeals *held*:

1. The trial court erred by failing to conduct a timely adjudication under MCR 3.972(A) and by adjourning the proceedings without complying with MCR 3.923(G), which allows a court to adjourn trials or hearings in child protective proceedings only for good cause, for as short a time as necessary, after considering the best interests of the child. The term "good cause," which is not defined in the court rule, means "a legally sufficient or substantial reason," as previous panels have held in related contexts. There are no indications in the record that the court had such a reason for adjourning or that the court considered the best interests of the child. However, because this error was partially attributable to the respondent and the respondent was not prejudiced by the repeated adjournments, substantial justice does not require reversal.

2. The trial court erred by admitting hearsay evidence when considering a termination petition at the initial dispositional hearing; however, because there was sufficient clear and convincing, legally admissible evidence to support the termination decision, reversal is not required.

3. The respondent's assertion that she had good cause for

failing to comply with the limited guardianship placement plan was predicated on her mental illness, which was the very condition that impaired her ability to care for her child. Accordingly, it did not constitute a legally sufficient or substantial reason for noncompliance. Because the noncompliance disrupted the parent-child relationship, the trial court did not err by concluding that this statutory ground for termination was proven by clear and convincing, legally admissible evidence, as was the ground that there was a reasonable likelihood that the child would be harmed if returned to the respondent's home.

Affirmed.

1. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — ADJOURNMENTS — GOOD CAUSE.

To support the adjournment of a trial or hearing in a child protective proceeding for good cause, there must be a showing of a legally sufficient or substantial reason for the adjournment (MCR 3.923[G]).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — STATUTORY GROUNDS FOR TERMINATION OF PARENTAL RIGHTS — GUARDIANSHIPS — LIMITED GUARDIANSHIP PLACEMENT PLAN NONCOMPLIANCE — WORDS AND PHRASES — GOOD CAUSE.

The phrase "good cause," in the provision that allows the termination of parental rights for failure to substantially comply with a limited guardianship plan without good cause, means "without a legally sufficient or substantial reason" (MCL 712A.19b[3][d]).

Karen Russell for the petitioner.

John J. Bologna for the respondent.

Before: WHITBECK, P.J., and O'CONNELL and KELLY, JJ.

KELLY, J. Respondent mother appeals as of right the trial court order terminating her parental rights to her minor child pursuant to MCL 712A.19b(3)(d) (parent's noncompliance with a limited guardianship placement plan resulted in a disruption of the parent-child relationship) and (j) (reasonable likelihood that the child will be harmed if returned to parent). We affirm.

I. BASIC FACTS AND PROCEEDINGS

In March 2002, respondent filed a petition with the probate court requesting the appointment of Carolyn H. Roach as the limited guardian for the minor child pursuant to MCL 700.5205, because respondent lacked housing. Roach was the mother of respondent's boyfriend and acted as a surrogate grandmother to the minor child. The probate court granted the petition, and for the five years between the time the petition was granted and the time of the dispositional hearing, the minor child lived with Roach. The probate court ordered respondent to comply with a limited guardianship placement plan, which required respondent to visit the minor child seven times a week and participate in positive outings, have daily telephone contact with the child, provide transportation to school, attend all school conferences and nonemergency doctor and dentist appointments, pay for babysitting, and contribute $200 a month for room, board, and expenses and $100 a month for food.

In June 2004, respondent petitioned the probate court to terminate the guardianship of the minor child, but the petition was dismissed after respondent and Roach agreed to a consent order for visitation. This order provided for visitation every Saturday from 10:00 a.m. to 2:00 p.m. at Roach's home.

In June 2005, Roach suspended respondent's parenting time because she found that respondent's behavior was disruptive. Respondent then petitioned the probate court to terminate the guardianship. The court adopted a transition plan on August 8, 2005, requiring that respondent obtain a recommendation for a psychiatrist and receive a full psychiatric evaluation, including a comprehensive recommendation for treatment and medication. The plan provided that respondent should

comply with any medication and treatment recommendations and authorize the release of her medical and counseling records to the court, Laura Henderson (the minor child's therapist), Karen Russell (who, before acting as petitioner in this matter, had been the minor child's guardian ad litem), and respondent's attorney. The plan required respondent to participate in parenting classes and maintain adequate housing and a legitimate source of income. The plan also provided that Henderson should facilitate parenting time, following the receipt of respondent's psychiatric evaluation. The court ordered that the matter would be reviewed in six months.

Respondent failed to provide a report confirming that she had received a full psychiatric evaluation. On February 15, 2006, the probate court denied respondent's motion to terminate the guardianship, finding that respondent had failed to substantially comply with the transition plan. The probate court suspended respondent's parenting time and directed the guardian ad litem to take appropriate action in the juvenile court on behalf of the minor child.

The guardian ad litem, now petitioner in this matter,[1] filed the initial petition with the trial court in this matter on June 6, 2006, claiming that respondent had failed to comply with the court-structured transition plan, which resulted in a disruption in the parent-child relationship. Petitioner alleged that respondent had significant mental health issues, including bipolar disorder. Petitioner requested that the court take jurisdiction of the minor child. In an amended petition filed on August 21, 2006, petitioner requested the termination of respondent's parental rights pursuant to MCL

[1] The lower court record indicates that once Russell became the petitioner, a different guardian ad litem was appointed.

712A.19b(3)(d), (e), (g), and (j), at the initial disposition phase. The court adjourned the matter on five occasions before the case came before the court in June 2007, approximately a year after petitioner filed the initial petition.

The trial court then asserted jurisdiction over the child on the basis of the prior order of the probate court finding that respondent had failed to comply with the transition plan, MCL 712A.2(b)(3).[2] The court proceeded to the dispositional hearing. When the hearing began, respondent had not had visitation with the child for over two years.

Elaine Ball-Tyler, a guardianship investigator with the probate court, testified that she first had contact with respondent because the maternal grandparents had been appointed as limited guardians of respondent's two older children. During an investigation regarding the guardianship of the older children in August 2001, Ball-Tyler visited respondent's home and reported that it had a very unpleasant odor, and clothing, debris, papers, and materials from various projects were strewn about the house. Ball-Tyler first met the minor child who is the subject of this action in April 2002, when she conducted a guardianship investigation pursuant to a referral based on respondent's petition for guardianship in the instant case. The child, then almost five years old, was fearful, unaccustomed to sleeping alone, and frequently wet the bed. Ball-Tyler recalled that the child had poor communicative language skills, did not know how to hold a crayon, and did not know the alphabet, numbers, or colors. Ball-Tyler described the child as disheveled and indicated that she

[2] It appears that the trial court regarded the transition plan as a modified limited guardianship plan, and respondent does not challenge this consideration on appeal.

had not received most of her immunizations, had a drifting eye, and she required dental care.

Ball-Tyler asserted that respondent had not complied with the limited guardianship placement plan in that she had failed to visit the minor child seven times a week, attend medical appointments, pay for babysitting, contribute $200 a month for room and board, or contribute $100 a month for food. Respondent admitted that she had not provided any money for room, board, or food, claiming that she could not afford it.

Henderson, the child's therapist, opined that there was no bond between respondent and the minor child and that there had been a dramatic disruption in the parent-child relationship. There was a "huge gap of time" when respondent did not have any consistent contact with the child, and the child did not recall any positive memories of respondent. Henderson believed that, if the child were returned to respondent, she would most likely "show some significant regressive behavior fairly quickly." Henderson did not believe that, given respondent's history, the child would be psychologically safe if returned to respondent. During the two years Henderson had conducted therapy with the minor child, she saw a significant reduction in the child's anxiety and depression. Henderson asserted that the child was thriving in her environment, which was evidenced by her success in school and relationships with her friends. Ball-Tyler reported that the child was happy, secure, confident, and succeeding in school and involved in a variety of activities. Henderson believed that the child needed closure, consistency, and stability, and she asserted that termination was in the child's best interests.

Respondent's therapist, Sandra Fringer, testified that, during the preceding year, respondent had been

working on stress management techniques and had made improvement. Fringer stated that respondent's psychiatrist had reported that her condition was stable. However, Fringer testified that she understood that respondent had a psychiatric hospitalization seven months before the dispositional hearing began. Fringer was unable to offer an opinion with respect to respondent's ability to parent or maintain her own household. Respondent similarly claimed that she had been stable for a year before the dispositional hearing. In addition, respondent's friend, Sherry Pinch, testified that she believed that respondent could be a good parent to the minor child.

The minor child informed Henderson that, before she began living with Roach, respondent's older children had permitted her to jump out of a window onto a trampoline while respondent was at work and that they had once locked her out of the house. With respect to the trampoline incident, respondent admitted that she had left the minor child under the supervision of her older children, then ages 8 and 12, and she blamed them for the lapse in judgment. Respondent did not believe that her older children had locked the minor child out of the home.

Respondent admitted that, during the time the minor child had been living with Roach, she had been involved in two different relationships that exhibited poor judgment. In both of these relationships, she moved in with a man whom she had known for a short time and lived with him for one to two months. Both of these relationships involved incidents of domestic violence for which the police were summoned.

Respondent testified that she was unable to obtain the required psychiatric evaluation because the psychiatrists to whom she had been referred would not

accept her insurance. However, she admitted that she received a psychiatric evaluation in December 2005 and that the doctor recommended lithium. Respondent asserted that she was unable to take lithium because it caused seizures and that the doctor was unwilling to prescribe any other medications. Respondent did not know why she had not presented this evaluation to the court, but she explained that she had been having trouble or mental problems at the time and could not manage to obtain the records, even though she had an attorney.

The trial court terminated respondent's parental rights to the minor child pursuant to MCL 712A.19b(3)(d) (parent's noncompliance with a limited guardianship placement plan resulted in a disruption of the parent-child relationship) and (j) (reasonable likelihood that the child will be harmed if returned to parent). This appeal follows.

II. ADJOURNMENTS

Respondent argues that the trial court erred by failing to conduct a timely adjudication pursuant to MCR 3.972(A). We agree that the trial court erred, but we conclude that this error did not affect the outcome of the proceedings and therefore does not warrant reversal.

A. STANDARDS OF REVIEW

Generally, this Court reviews a ruling on a motion for a continuance for an abuse of discretion. *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993). However, because respondent failed to raise this issue before the trial court, it has not been properly preserved for appellate review. *In re NEGP*, 245 Mich App 126, 134; 626 NW2d 921 (2001). Our review is therefore limited to plain error affecting substantial rights. *People v*

Carines, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings. *Id.* at 763. When plain error has occurred, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant *or* when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999) (quotation marks and citations omitted; alteration in original), citing *Carines*, *supra* at 763-764.

This issue also involves the interpretation of a court rule, which is a question of law that we review de novo. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006); *In re BAD*, 264 Mich App 66, 72; 690 NW2d 287 (2004). We likewise review de novo the construction of the term "good cause." *In re FG*, 264 Mich App 413, 417; 691 NW2d 465 (2004).

B. ANALYSIS

MCR 3.972(A) provides the following time requirements for conducting a trial after a petition has been filed:

> If the child is not in placement, *the trial must be held within 6 months after the filing of the petition unless adjourned for good cause under MCR 3.923(G).* If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:
>
> (1) on stipulation of the parties for good cause;
>
> (2) because process cannot be completed; or
>
> (3) because the court finds that the testimony of a presently unavailable witness is needed.

> When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guardian, or legal custodian will likely result in physical harm or serious emotional damage to the child.
>
> If the child has been removed from the home, a review hearing *must be held within 182 days of the date of the child's removal* from the home, even if the trial has not been completed before the expiration of that 182-day period. [Emphasis added.]

Here, the 63-day requirement is inapplicable. The minor child was not "in placement" as she had been living with a limited guardian and was not in "foster care, a shelter home, a hospital, or a private treatment agency." MCR 3.903(C)(8). Rather, MCR 3.972(A) requires that the trial should have been conducted within six months of the date the petition was filed "unless adjourned for good cause under MCR 3.923(G)." Pursuant to MCR 3.923(G), "[a]djournments of trials or hearings in child protective proceedings should be granted only (1) for good cause, (2) after taking into consideration the best interests of the child, and (3) for as short a period of time as necessary."

"Good cause" is not defined by court rule. Therefore, we consult a dictionary and caselaw to assist us in ascertaining its meaning. *In re FG*, *supra* at 418; *Richards v McNamee*, 240 Mich App 444, 451; 613 NW2d 366 (2000). Black's Law Dictionary (8th ed) defines good cause as "[a] legally sufficient reason." See *Richards*, *supra* at 451-453 (discussing the dictionary definition of "good cause" in applying MCR 2.102[D]). In the context of MCR 3.615(B)(3),[3] this Court has defined good cause as "[a] legally sufficient reason" and

[3] MCR 3.615 governs proceedings pursuant to the Parental Rights Restoration Act (PRRA), MCL 722.901 *et seq*. MCR 3.615(B)(3) prohibits

"a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." *In re FG*, *supra* at 419 (quotation marks and citation omitted). We adopt the same definition here, and hold that in order for a trial court to find good cause for an adjournment, "a legally sufficient or substantial reason" must first be shown. See *id*.

Petitioner filed the initial petition on June 6, 2006, and the trial court scheduled a pretrial hearing for June 21, 2006. On June 21, 2006, the court adjourned the hearing, and it was rescheduled for July 26, 2006. This hearing was also adjourned, and it was rescheduled for August 29, 2006. The lower court record does not contain any indication regarding the reasons for these two adjournments, and no legally sufficient or substantial reasons supporting these adjournments are apparent from the record. Moreover, there are no indications that the best interests of the child were considered. The trial court erred in repeatedly adjourning these proceedings. However, we conclude that this error does not require reversal in this case.

When the parties appeared for the August 29, 2006, hearing, respondent formally requested a hearing before a judge rather than a referee pursuant to MCR 3.912(B). The pretrial hearing was adjourned and rescheduled before a judge for September 19, 2006. No determination regarding good cause was made with respect to this adjournment. However, "[i]t is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence." *Lewis v LeGrow*, 258 Mich App 175, 210; 670

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the release of the contents of the court file maintained under the PRRA absent "good cause shown and only for a purpose specified in the order of the court."

NW2d 675 (2003). Given that this adjournment may be attributed to respondent, any error in this adjournment does not require reversal.

The court convened on September 19, 2006, and respondent requested a jury trial. The trial court scheduled a jury trial for January 4, 2007. Respondent's request for a jury trial likely constitutes a legally sufficient or substantial reason for this adjournment, but there are no indications that the best interests of the child were taken into consideration or that the 3½-month period of adjournment was as short as necessary. See MCR 3.923(G)(2) and (3). However, given that this adjournment may also be attributed to respondent, any error that occurred does not require reversal. See *Lewis*, *supra* at 210.

At a December 18, 2006, motion hearing, respondent's counsel informed the court that respondent was hospitalized. In answer to the court's questions, the minor child's guardian ad litem asserted that the child was safe, in stable placement, and would not experience any potential prejudice or harm if the matter were adjourned. Respondent's doctor, who was contacted after the hearing, informed respondent's attorney that she was not expected to be able to participate in the proceedings scheduled for January 2007. The trial court entered an order adjourning the January 4, 2007, trial, ruling that good cause had been shown by respondent's hospitalization. The court rescheduled the jury trial for March 27, 2007. Given respondent's hospitalization and the expectation that she would be unable to participate in the proceedings, there was a legally sufficient or substantial reason for this adjournment. The trial court also took the best interests of the child into consideration, and there is no indication that the 2½- month adjournment was longer than necessary. We therefore conclude that this adjournment was proper pursuant to MCR 3.972(A).

On March 12, 2007, respondent filed a stipulated waiver of jury trial, requesting a bench trial on March 27, 2007. The trial court scheduled a bench trial for March 27, 2007, and the parties appeared on that date. The guardian ad litem requested that the court transfer the case back to the referee for trial, and respondent waived her right to a trial before a judge and consented to transfer the case to the referee. The trial before the referee was scheduled to begin on June 26, 2007, and it commenced as scheduled. Given that respondent contributed to the delay by consenting to transfer the case back to the referee, any error in this adjournment does not require reversal. See *Lewis*, *supra* at 210.

The petition was filed on June 6, 2006, and the trial was not conducted until June 26, 2007, more than six months beyond the time limit provided in MCR 3.972(A). The high number of adjournments in this case was inappropriate. However, respondent has not claimed prejudice. She merely notes that memories and circumstances may change over time, and she does not assert any violation of due process guarantees.

With respect to the failure to comply with the requirement that a termination hearing on a supplemental petition be conducted within 42 days after the supplemental petition is filed, this Court has noted that the court rule and applicable statute provided no sanctions for the violation.[4] *In re Jackson*, *supra* at 28-29; *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991). The *Kirkwood* Court declined to include a

[4] In *In re Jackson*, *supra* at 28-29, and *In re Kirkwood*, 187 Mich App 542, 545-546; 468 NW2d 280 (1991), the Court applied former MCR 5.974(F)(1)(a). The rules governing juvenile proceedings have since been amended and renumbered, effective May 1, 2003. MCR subchapter 5.900 was moved to new MCR subchapter 3.900, and MCR 3.977 corresponds to former MCR 5.974. *In re JK*, 468 Mich 202, 209 n 17; 661 NW2d 216 (2003).

sanction in those provisions and held that "[s]uch a procedural defect, standing alone, will not cause us to dismiss the case or set aside the termination order." *Kirkwood*, *supra* at 546. MCR 3.902(A) provides that MCR 2.613 governs limitations on the correction of errors in proceedings involving juveniles. *In re TC*, 251 Mich App 368, 371; 650 NW2d 698 (2002). MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

MCR 3.972(A) does not provide a sanction for a violation of the six-month time limit, and, given the circumstances of this case, respondent could have actually benefited from the additional time because she could continue to work on establishing stability and resolving any barriers to reunification. See *In re Gazella*, 264 Mich App 668, 674; 692 NW2d 708 (2005); *In re Jackson*, *supra* at 29. Therefore, respondent was not prejudiced by the repeated and erroneous adjournments, and substantial justice does not require reversal.

III. ADMISSIBILITY OF EVIDENCE

Respondent contends that the trial court improperly admitted hearsay evidence at the initial dispositional hearing, which resulted in the termination of her parental rights. We agree that hearsay was improperly admitted, but we conclude that there was sufficient clear and convincing, legally admissible evidence to support the trial court's decision to terminate respondent's parental rights.

A. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's decision regarding the admission of evidence. *In re Archer*, 277 Mich App 71, 77; 744 NW2d 1 (2007). An abuse of discretion occurs when the trial court chooses an outcome that falls "outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). When an evidentiary question involves a question of law, such as the interpretation of a statute or court rule, our review is de novo. *In re Archer*, *supra* at 77; *In re BAD*, *supra* at 72.

The statutory grounds for termination of parental rights must be proven by clear and convincing evidence. MCR 3.977(E)(3). "If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights . . . unless the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). We review for clear error a trial court's decision to terminate parental rights and, if appropriate, its decision regarding whether termination is contrary to the child's best interests. MCR 3.977(J); *In re JK*, 468 Mich 202, 209; 661 NW2d 216 (2003). A decision is clearly erroneous if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, *supra* at 209-210.

B. PROTECTIVE PROCEEDINGS

Child protective proceedings consist of two distinct phases: the trial, also known as the adjudicative phase, and the dispositional phase. *In re AMAC*, *supra* at 536. During the adjudicative phase, which occurs first, the

trial court determines whether it may exercise jurisdiction over the minor child pursuant to MCL 712A.2(b). *In re AMAC*, *supra* at 536. If the court conducts a trial, "the rules of evidence for a civil proceeding and the standard of proof by a preponderance of evidence apply . . . notwithstanding that the petition contains a request to terminate parental rights." MCR 3.972(C)(1); *In re AMAC*, *supra* at 536. If the court acquires jurisdiction over the child, the dispositional phase follows, at which the trial court determines "what action, if any, will be taken on behalf of the child." *In re AMAC*, *supra* at 536-537; see also MCR 3.973(A). The dispositional phase must be conducted immediately after the adjudicative hearing or after proper notice has been given. *In re AMAC*, *supra* at 538. Unlike the adjudicative phase, the Michigan Rules of Evidence do not generally apply at an initial dispositional hearing. MCR 3.973(E)(1); *In re AMAC*, *supra* at 537.

The trial court may order termination at an initial dispositional hearing under certain circumstances. MCL 712A.19b(4); *In re CR*, 250 Mich App 185, 201; 646 NW2d 506 (2002). MCR 3.977(E) provides the procedural requirements for terminating parental rights at an initial dispositional hearing as follows:

> The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
>
> (1) the original, or amended, petition contains a request for termination;
>
> (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

> (3) at the initial disposition hearing, the court finds on the basis of *clear and convincing legally admissible evidence* that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:
>
> (a) are true, and
>
> (b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (*l*), (m), or (n);
>
> unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child. [Emphasis added.]

Petitioner sought termination of respondent's parental rights in the amended petition, and the trial court assumed jurisdiction over the child on the basis of the prior order of the probate court that stated that respondent had failed to comply with the limited guardianship plan, MCL 712A.2(b)(3). Therefore, clear and convincing, legally admissible evidence was required to establish the grounds for termination.

We reject petitioner's argument that *In re Gilliam*, 241 Mich App 133; 613 NW2d 748 (2000), and *In re Snyder*, 223 Mich App 85; 566 NW2d 18 (1997), dictate that the Michigan Rules of Evidence do not apply. Both cases involved former MCR 5.974(E),[5] which governed the termination of parental rights based on changed circumstances. See *Gilliam*, *supra* at 136-138; *Snyder*, *supra* at 89-90. Given that petitioner did not seek termination on the basis of changed circumstances, MCR 3.977(F) does not apply, and petitioner's reliance on *Snyder* and *Gilliam* is misplaced. Rather, petitioner sought termination of respondent's parental rights at

[5] Former MCR 5.974(E) corresponds to current MCR 3.977(F). See *In re JK*, *supra* at 209 n 17.

the initial disposition in the amended petition, and MCR 3.977(E) provides that clear and convincing, legally admissible evidence was required.

C. HEARSAY

Respondent claims that there were repeated instances of hearsay pertaining to statements Roach made about respondent, statements the minor child made to Henderson, and statements contained in police reports. Respondent also indicates that Ball-Tyler improperly testified about statements made by the maternal grandparents. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible unless the rules of evidence provide otherwise. MRE 802.

Henderson testified that the minor child told her that she was afraid of respondent because respondent yelled, threw things at her boyfriend, and engaged in incidents of domestic violence with him. Ball-Tyler testified that the minor child told her that she did not want to have telephone calls or visitation with respondent, that the visits were not good, that respondent made her feel afraid, that she cried the night before a visit was scheduled to occur, and that she did not think respondent would ever get well. Ball-Tyler also related that the child said that respondent used "bad words," asked her to keep secrets, and threatened not to let the minor child see Roach or Roach's family if she were returned to respondent. Although these statements constitute hearsay, they are admissible as exceptions because they pertain to the minor child's then-existing mental or emotional condition. Statements that the declarant is afraid may be admissible pursuant to MRE 803(3) to

prove the declarant's state of mind. *People v Bauder*, 269 Mich App 174, 188-189; 712 NW2d 506 (2005); *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2002). These statements were relevant pursuant to MRE 401 because they tended to show that the parent-child relationship had been disrupted under MCL 712A.19b(3)(d), which was at issue.

Ball-Tyler also testified that she had reviewed multiple police reports regarding domestic violence involving respondent; two reports involved respondent committing acts of domestic violence, and one involved her being the alleged victim of such violence. Ball-Tyler conducted an investigation in response to the June 2005 petition to terminate the guardianship, and although respondent had reported that she was living with the maternal grandparents, Ball-Tyler was unable to schedule a home visit by contacting their residence. Ball-Tyler's testimony demonstrated that respondent was not living with her parents; rather, it indicated that respondent was living at other locations at various times. Ball-Tyler's testimony was offered to demonstrate that respondent had not been consistently living with the maternal grandparents, and not for the truth of the matter asserted, i.e., that respondent was living with various boyfriends, was violent, or was involved in abusive relationships. Therefore, this testimony does not constitute hearsay pursuant to MRE 801(c). See *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 35-36; 730 NW2d 17 (2006). These reports themselves were not admitted into evidence. Although Ball-Tyler may have offered more testimony than necessary to establish respondent's residence, respondent admitted that, during the time the minor child was living with Roach, respondent had been involved in two relationships in which incidents of

domestic violence occurred and the police were summoned. Respondent testified regarding other domestic violence incidents as well, further elaborating on Ball-Tyler's testimony.

Ball-Tyler asserted that the maternal grandparents had told her that they did not believe respondent could manage her own residence or was capable of being on her own and that they were concerned about the stability and consistency of her behavior over time. Because these statements were offered to prove the truth of the matter asserted, i.e., that respondent was not able to manage her own residence or live on her own and that her behavior was not stable or consistent over time, they constitute hearsay. MRE 801(c). Ball-Tyler also asserted that Henderson told her that the visits with respondent were causing stress and anxiety for the minor child and were counterproductive. Ball-Tyler stated that Roach reported being frustrated with respondent because of the problems during the visits with the minor child and respondent's inappropriate actions. Henderson testified that the child expressed that she was afraid that respondent would take her away from Roach, whom she regarded as her grandmother. These statements constitute hearsay because they were offered for the truth of the matter asserted, i.e., that respondent's visits with the child were not productive. MRE 801(c).

Ball-Tyler testified that Roach told her that respondent rarely arrived at 10:00 a.m. for the scheduled visits with the minor child and that the child was attempting to avoid telephone calls with respondent. To the extent that these statements were offered to prove the truth of the matter asserted, i.e., that respondent was not timely for her visits, they constitute hearsay. MRE 801(c). However, respondent acknowledged that she had not

arrived on time for her weekly visitation with the minor child and admitted that she did not believe it was important to be on time.

Ball-Tyler stated that the maternal grandparents had informed her that respondent's two older children had "great parental responsibility" for the minor child. Henderson testified that the child had similarly told her that respondent's older children were frequent caregivers and that the child had identified three incidents involving the older children: they permitted her to jump out of a window onto a trampoline, they locked her out of the house, and they permitted her to eat dog food. These statements constitute hearsay because they were offered for the truth of the matter asserted, i.e., that respondent left the minor child in the care of her older children. MRE 801(c). However, with respect to the trampoline incident, respondent admitted that she had left the minor child in the care and supervision of her older children while she was at work. Respondent also asserted that she did not believe that her older children had locked the minor child out of the home.

Although the trial court abused its discretion by allowing the admission of extensive hearsay statements, detailed above, to prove the statutory bases for termination of respondent's parental rights, MCR 3.977(E)(3), reversal is not necessarily required. To the extent that respondent testified regarding the substance of hearsay statements that were improperly admitted, she must demonstrate that substantial justice requires us to reverse the order terminating her parental rights. MCR 2.613(A); MCR 3.902(A); *In re TC*, *supra* at 371. If petitioner provided clear and convincing, legally admissible evidence that respondent substantially failed, without good cause, to comply with the limited guardianship placement plan and that this

noncompliance resulted in a disruption of the parent-child relationship, MCL 712A.19b(3)(d), or that there was a reasonable likelihood that the child would be harmed if returned to respondent, MCL 712A.19b(3)(j), reversal is not warranted. See *In re CR*, *supra* at 206-208.

D. MCL 712A.19b(3)(d)

The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(d), which provides:

> The child's parent has placed the child in a limited guardianship under section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, and *has substantially failed, without good cause, to comply with a limited guardianship placement plan* described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205, regarding the child to the extent that the noncompliance has resulted in a disruption of the parent-child relationship. [Emphasis added.]

Again, the term "good cause" is not defined in the statute. As discussed earlier, this Court defines "good cause" as "a legally sufficient or substantial reason," and we adopt the same definition here. Termination is therefore appropriate pursuant to MCL 712A.19b(3)(d) if a respondent fails to substantially comply with a limited guardianship plan without a "legally sufficient or substantial reason," and this noncompliance results in a disruption of the parent-child relationship.

The probate court expressly found "that there has been no substantial compliance by the natural mother with the Transition Plan . . . ." Henderson testified at the dispositional hearing that she never received respondent's psychiatric evaluation, which supports the probate court's finding that respondent failed to comply

with the transition plan. However, respondent asserted that she had difficulty obtaining a psychiatric evaluation because she could not find a psychiatrist who accepted her insurance. Although much of the evidence disproving this claim was improperly admitted hearsay,[6] respondent's own testimony was sufficient to demonstrate that her noncompliance with the transition plan was without good cause. Respondent admitted that she had received a psychiatric evaluation in December 2005, but she explained that, because of her mental problems at the time, she could not manage to obtain the records, even though she was represented by counsel. Because respondent's asserted cause for noncompliance with the transition plan, i.e., her mental illness, is the very condition that impairs her ability to care for the child, it cannot constitute a legally sufficient or substantial reason. The absence of good cause was established by clear and convincing, legally admissible evidence.

Respondent's failure to comply with the transition plan resulted in a further disruption of the parent-child relationship, which was already severely disrupted by that time. Roach suspended respondent's parenting time in June 2005, and the probate court suspended respondent's parenting time in February 2006 because respondent had failed to comply with the transition plan. Henderson did not facilitate visitation because she never received a psychiatric evaluation, and visits were never reinstated. Visitation was ultimately suspended when petitioner sought termination of respondent's parental rights in August 2006. See MCL 712A.19b(4).

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[6] For example, Ball-Tyler testified that a previous therapist of respondent informed her that she had advised respondent of several psychiatrists who would accept her insurance and perform a psychiatric evaluation. Respondent does not challenge the admission of this testimony.

Thus, the eight-month gap in visits from the time of respondent's psychiatric evaluation in December 2005 until the filing of the termination petition in August 2006 is wholly attributable to respondent's failure to comply with the transition plan. This clearly constitutes a disruption in the parent-child relationship, and termination on this ground was proven by clear and convincing, legally admissible evidence.

E. MCL 712A.19b(3)(j)

Given our conclusion that the grounds for termination pursuant to MCL 712A.19b(3)(d) were established by clear and convincing evidence, it is not necessary to address the second ground for termination pursuant to MCL 712A.19b(3)(j). *In re Trejo Minors*, 462 Mich 341, 360; 612 NW2d 407 (2000). We nonetheless provide analysis as follows.

The trial court also terminated respondent's parental rights pursuant to MCL 712A.19b(3)(j) because it found that there was a reasonable likelihood that, given respondent's conduct or capacity, the child would be harmed if returned to respondent's home. Respondent suffers from bipolar disorder, and she testified that, from 1994 until July 2006, she was not stable. Respondent admitted that she made poor decisions during the time the minor child lived with Roach, including living with two abusive men whom she knew for very short periods before beginning to live together. Respondent continued to exhibit poor judgment at the dispositional hearing, for example, by testifying that she felt it had been appropriate to leave the minor child in the care of her older children, who were then 8 and 12 years old, while respondent was at work. Respondent attributed the trampoline incident to poor judgment on the part of her older children, but not herself for leaving them in

charge of the minor child. Respondent also indicated that she did not believe that her older children had locked the minor child out of the house. Respondent acknowledged that she might have disappeared between November 2003 until May 2004 and failed to remember it. She testified that she had been physically and mentally unable to visit the minor child for the entire four-hour visitation periods that were allowed during part of the limited guardianship. She answered affirmatively when asked whether a seven-year-old was supposed to realize that her mother just could not come to visit.

Fringer could not provide an opinion with respect to respondent's ability to maintain a household on her own or on her ability to parent. She indicated that, after six additional months of therapy, respondent could "possibly" care for herself without therapy and could improve enough to potentially parent. Fringer also testified that respondent had a psychiatric hospitalization in December 2006, contradicting respondent's own testimony that she was hospitalized at Oakland General Hospital for a heart attack and later transferred to the Detroit Behavioral Institute for three or four days for observation of her heart. Respondent herself testified that she had been stable since July 2006. Any rational evaluation of the evidence must take into account respondent's lengthy history of instability as relevant to her current capacity to provide proper care for the child. Respondent's lengthy period of instability, compared to the recent period of stability reported by herself and Fringer, in combination with her own testimony indicating a continuing lack of judgment, insight, and empathy for the child, provided sufficient evidence to support termination pursuant to MCL 712A.19b(3)(j). Thus, despite the extensive hearsay erroneously received by the trial court, we conclude that

the trial court's decision to terminate was supported by clear and convincing, legally admissible evidence. MCR 3.977(E)(3).

Affirmed.

PEOPLE v HAYNES

Docket No. 277185. Submitted August 5, 2008, at Lansing. Decided September 23, 2008, at 9:05 a.m.

Jeffrey S. Haynes pleaded no contest in the Calhoun Circuit Court to a charge of committing the abominable and detestable crime against nature with a sheep, MCL 750.158. The court, Conrad J. Sindt, J., sentenced the defendant as a fourth-offense habitual offender to 30 to 240 months in prison and ordered him to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The Court of Appeals, MURRAY, P.J., and KELLY and FORT HOOD, JJ., denied the defendant's delayed application for leave to appeal from the part of the trial court's order requiring him to register as a sex offender. Unpublished order entered October 5, 2006 (Docket No. 272609). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 477 Mich 1067 (2007).

The Court of Appeals *held*:

1. MCL 750.158 encompasses two categories of abominable and detestable crimes against nature, one with a human being and the other with an animal.

2. The SORA does not apply to the portion of MCL 750.158 that prohibits bestiality.

3. The SORA provides in MCL 28.722(e)(*ii*) that a "listed offense" covered by the act includes a violation of MCL 750.158 if the victim is an individual less than 18 years of age. The plain meanings of the terms "if" and "individual" requires the victim of a listed offense to be a human being less than 18 years old. The defendant's offense is not a listed offense under MCL 28.722(e)(*ii*).

4. None of the "catchall" provisions of MCL 28.722(e) regarding whether an offense is a "listed offense" applies to a person who commits the abominable and detestable crime against nature with an animal. The part of the trial court's order requiring the defendant to register as a sex offender must be vacated.

Vacated in part.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — BESTIALITY.

A person convicted of committing the abominable and detestable crime against nature with an animal, bestiality, is not required to register as a sex offender under the Sex Offenders Registration Act (MCL 28.722(e)(*ii*), 750.158).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *John A. Hallacy*, Prosecuting Attorney, and *Jennifer Kay Clark*, Assistant Prosecuting Attorney, for the people.

Law Offices of Suzanna Kostovski (by *Suzanna Kostovski*) for the defendant.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM. Defendant pleaded no contest to a charge of committing the "abominable and detestable crime against nature" with a sheep. MCL 750.158. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 30 to 240 months' imprisonment. In addition, the trial court found that defendant's actions indicated sexual perversion, so the court ordered defendant to register under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. This Court initially denied defendant's delayed application for leave to appeal,[1] but our Supreme Court, in lieu of granting leave to appeal, remanded this case to this Court for consideration as on leave granted. *People v Haynes*, 477 Mich 1067 (2007). Defendant only appeals the propriety of the trial court's order requiring him to register as a sex offender. We vacate the part of the trial court's order requiring defendant to register as a sex offender because the SORA does not apply to the portion of MCL 750.158 that prohibits bestiality.

[1] *People v Haynes*, unpublished order of the Court of Appeals, entered October 5, 2006 (Docket No. 272609).

The construction and application of the SORA presents a question of law that this Court reviews de novo on appeal. *People v Golba*, 273 Mich App 603, 605; 729 NW2d 916 (2007). The primary objective in construing a statute is to ascertain and give effect to the Legislature's intent. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). We begin this task "by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Unless they are otherwise defined in the statute or are terms of art or technical words, we assign the words of a statute their plain and ordinary meaning. *Id*.; *People v Meyers,* 250 Mich App 637, 643; 649 NW2d 123 (2002). If a statute leaves words undefined, we may consult a dictionary to "aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings." *Morey*, *supra* at 330. Only if "the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Id*. Although we must, as far as possible, give effect to every word, phrase, and clause in the statute, *id*., "[w]e 'may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' " *Bay Co Prosecutor v Nugent*, 276 Mich App 183, 189; 740 NW2d 678 (2007), quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

The statute that defendant was convicted of violating provides:

> Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years,

> or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life. [MCL 750.158.]

It is patent that MCL 750.158 encompasses two categories of crimes: "abominable and detestable crime[s] against nature" with a human being, and "abominable and detestable crime[s] against nature" with an animal. A "crime against nature" at common law encompassed both sodomy and bestiality. *People v Carrier*, 74 Mich App 161, 165; 254 NW2d 35 (1977). "Michigan follows the common-law definition of sodomy," which "covered only copulation *per anum*," not fellatio. *People v Dexter*, 6 Mich App 247, 250; 148 NW2d 915 (1967). Acts of bestiality, however, included a broader range of conduct than that of common-law sodomy. *Carrier*, *supra* at 166. An act of bestiality included any sexual connection between a human being and an animal and is expressly prohibited by MCL 750.158.[2] *Carrier*, *supra* at 166.

Subject to certain temporal exceptions not present here, the SORA requires an individual who is convicted of a listed offense after October 1, 1995, to be registered under its provisions. MCL 28.723(1)(a); *Golba, supra* at 605. Pertinent to this appeal, the SORA defines "listed offense" as including "A violation of section 158 of the Michigan penal code, 1931 PA 328, MCL 750.158, if a victim is an individual less than 18 years of age." MCL 28.722(e)(*ii*).

Our courts have not had occasion to construe MCL 28.722(e)(*ii*), and the SORA does not define the terms "if" or "individual." *Random House Webster's College*

[2] To sustain a conviction under MCL 750.158, "sexual penetration, however slight," is required. MCL 750.159; *Carrier*, *supra* at 166.

Dictionary (1997), provides the following definitions for "if": "in case that," "on condition that," "a condition or stipulation," and "qualifications or excuses." And, *Random House Webster's College Dictionary* (1997) defines "individual" as a "single human being" or "person." This dictionary definition of "individual" is consistent with the Legislature's use of that word in other contexts associated with being a crime "victim," as it is in MCL 28.722(e)(*ii*). For example, when the word "individual" is associated with the word "victim" in crime victims' rights legislation, its context potentially encompasses only human beings. Thus, MCL 780.752(1)(*l*)(*i*) and MCL 780.811(1)(g)(*i*) define "victim" as "an individual" capable of having a spouse or a guardian. Only human beings are able to marry and have spouses. Moreover, animals either are wild or domesticated and owned by people; they do not have guardians in the legal sense. Similarly, MCL 780.781(1)(g) and (i)(*i*) define "victim" as a "person who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of an offense" and "person" as "*an individual*, organization, partnership, corporation, or governmental entity." (Emphasis added.) Also, unless a contract or statute provides a different definition, this Court has recognized that the term "an individual" designates a natural person or a single human being. See *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 630 n 3; 752 NW2d 479 (2008) (applying a dictionary definition to the undefined term "individual" in the General Property Tax Act, MCL 211.1 *et seq*.), and *Stoddard v Citizens Ins Co of America*, 249 Mich App 457, 466; 643 NW2d 265 (2002) (construing an insurance contract).

As already noted, we must enforce the Legislature's intent as expressed in the plain language of the statute and use dictionary definitions to ascertain their plain, ordinary, and generally accepted meanings. *Williams*,

supra at 250; *Morey*, *supra* at 330. When we apply the plain, ordinary, and generally accepted meanings of the words "if" and "individual" to MCL 28.722(e)(*ii*), we conclude that a violation of MCL 750.158 requires registration under the SORA for a listed offense only if the victim of the offense is a human being less than 18 years old. Certainly, if one gives the language of the statute its plain and common usage, it is patent that the sheep that was the object of defendant's "abominable and detestable crime against nature" is not a victim under MCL 28.722(e)(*ii*). Thus, we must conclude that the instant offense is not a listed offense pursuant to MCL 28.722(e)(*ii*).[3]

On appeal, the prosecution asserts that "the age provision in MCL 28.722(e)(*ii*) is intended to prohibit unnatural acts committed on minors, but not to exclude the bestiality component of the sodomy statute itself." But the plain meaning of the words the Legislature used in MCL 28.722(e)(*ii*) undermines this argument. We believe that such an interpretation would read language into the statute that it does not contain "and thus not within the manifest intent of the Legislature as derived from the words of the statute itself." *City of Monroe v James,* 259 Mich App 443, 450; 674 NW2d 703 (2003). Consequently, we must reject the prosecutor's argument because courts may not read or include provisions into a statute that the Legislature did not. *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008).

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[3] For the same reasons that a conviction for bestiality under MCL 750.158 does not fall within the purview of MCL 28.722(e)(*ii*), such a conviction is also not within the ambit of MCL 28.722(e)(*xi*), which includes "[a]ny other violation of a law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age."

The prosecution also argues that the trial court's order was proper under the catchall provision of MCL 28.722(e)(*xiv*), which allows a court to order registration for "[a]n offense substantially similar to an offense described in subparagraphs (*i*) to (*xiii*) under a law of the United States, any state, or any country or under tribal or military law." The prosecution presents this argument as one in the alternative should we, as we have, conclude that the Legislature excluded bestiality convictions from MCL 28.722(e)(*ii*). We find it completely illogical to conclude that the Legislature excluded an offense as a "listed offense" when addressing a specific statute but then included the same previously excluded offense in an unspecified catchall provision. Moreover, we find that by its plain language, MCL 28.722(e)(*xiv*) applies to offenses proscribed by federal law, the laws of other states, and laws of other countries that are similar to the listed Michigan offenses. It does not apply to offenses proscribed by the state of Michigan. Michigan offenses are already expressly enumerated as listed offenses or included by operation of the other catchall provisions.

The prosecution also advances a policy argument in support of its contention that bestiality is within the catchall "listed offense" provisions of the SORA. Specifically, the prosecution argues, "It is unlikely that many people would not find the defendant's behavior disturbing, to the extent that it could endanger the 'health, safety, morals, and welfare of the people, and particularly the children, of this state,' " quoting the Legislature's stated intent of the SORA in MCL 28.721a. Our job, however, is to enforce the clear and unambiguous terms of the statute as written. *People v Gardner*, 482 Mich 41, 50, 59; 753 NW2d 78 (2008); *Morey*, *supra* at 330. If the Legislature chooses to amend or revise MCL 28.722(e)(*ii*) to require an indi-

vidual to register as a sex offender for violating MCL 750.158 by sexually assaulting an animal, it may. *Gardner*, *supra* at 59-60. But this Court may not make the policy choice to require registration as a sex offender for the type of offense in the instant appeal.

We vacate that part of the trial court's order requiring defendant to register under the SORA. We do not retain jurisdiction.

ALVAN MOTOR FREIGHT, INC v DEPARTMENT OF TREASURY
UNITED PARCEL SERVICE, INC v DEPARTMENT OF TREASURY

Docket Nos. 276511 and 276736. Submitted August 6, 2008, at Lansing. Decided September 23, 2008, at 9:10 a.m.

Alvan Motor Freight, Inc. (AMF), filed a petition in the Tax Tribunal challenging a determination by the Department of Treasury that the petitioner was not entitled to a use-tax exemption under MCL 205.94k(2), now MCL 205.94k(4), for trucks operated solely within Michigan but carrying freight originating from, or destined for, locations outside Michigan. The Tax Tribunal affirmed the department's determination. AMF appealed.

United Parcel Service, Inc. (UPS), filed an action in the Court of Claims against the Department of Treasury, seeking a refund of use tax paid for delivery vans purchased outside Michigan but used solely in Michigan to carry packages originating from, or destined for, other states. The court, Laura Baird, J., granted summary disposition for UPS, rejecting the department's contention that UPS was not entitled to the use-tax exemption under MCL 205.94k(2). The department appealed. The Court of Appeals consolidated AMF's appeal and the department's appeal.

The Court of Appeals *held*:

MCL 205.94k(2) provided, in part, that after December 31, 1992, and before May 1, 1999, the use tax does not apply to the storage, use, or consumption of rolling stock used in interstate commerce and purchased, rented, or leased outside of Michigan by an interstate motor carrier. It is undisputed that UPS and AMF are interstate motor carriers that operate rolling stock, i.e., qualified trucks, in Michigan. At issue is whether the rolling stock of UPS and AMF are used in interstate commerce. The term "interstate commerce," as used in more than a century of Commerce Clause litigation, refers to trade in goods or services between different states. The plain and ordinary meaning of "used in interstate commerce" is "used in the trade of goods (commerce) between different states (interstate)." Under either meaning, rolling stock that is used to carry the persons or property that are the objects of commerce from outside Michigan to a point inside Michigan, or from a point inside Michigan to a point outside

Michigan, is used in interstate commerce. The trucks of UPS and AMF need not cross state lines in order for those carriers to be entitled to the use-tax exemption under MCL 205.94k(2).

Alvan Motor Freight reversed and remanded for further proceedings.

United Parcel Service affirmed and remanded for further proceedings.

TAXATION — USE TAX — EXEMPTIONS FROM USE TAX — INTERSTATE COMMERCE — ROLLING STOCK USED IN INTERSTATE COMMERCE.

Trucks purchased, rented, or leased outside Michigan but used exclusively in Michigan for interstate commerce qualify for a use-tax exemption so long as they carry persons or property originating from, or destined for, another state; such trucks need not cross state lines to qualify for the exemption (MCL 205.94k[2], now MCL 205.94k[4]).

Foster, Swift, Collins & Smith, P.C. (by *Robert E. McFarland*), for Alvan Motor Freight, Inc.

Dykema Gossett PLLC (by *Sherrill D. Wolford* and *Kathleen McCree Lewis*) and *Richard D. Birns* and *J. Edward Goff* for United Parcel Service, Inc.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Heidi L. Johnson-Mehney* and *Bruce C. Johnson*, Assistant Attorneys General, for the Department of Treasury.

Amicus Curiae:

Robert Digges, Jr., and *Fraser Trebilcock Davis & Dunlap, P.C.* (by *Michael S. Ashton* and *Graham K. Crabtree*), for American Trucking Associations, Inc.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM. In Docket No. 276511, petitioner Alvan Motor Freight, Inc. (AMF), appeals by right the decision of the Tax Tribunal upholding the position of the

Department of Treasury that AMF was not entitled to an exemption from taxation under § 4k of the Use Tax Act, MCL 205.91 *et seq*., because the AMF trucks operated wholly within Michigan and so were not "used in interstate commerce" within the meaning of the exemption even though carrying freight originating from or destined for locations outside the state. MCL 205.94k(4), formerly MCL 205.94k(2) (see 1996 PA 477 and 1999 PA 70). We reverse.

In Docket No. 276736, the department appeals by right the order of the Court of Claims granting summary disposition to plaintiff United Parcel Service, Inc. (UPS), under MCR 2.116(C)(10) on its claim for a refund of use taxes paid for the years 1998 through 2000 on brown delivery vans purchased outside Michigan but used wholly within the state to carry packages from or destined for other states.[1] On the basis of United States Supreme Court precedent, the Court of Claims rejected the department's position that UPS was not entitled to the exemption because its brown delivery vans did not cross state lines. We affirm.

The common issue in these consolidated appeals is whether the "rolling stock" of AMF and UPS that never leaves the state of Michigan, but does carry freight originating from or destined for locations outside the state, is "used in interstate commerce" so as to qualify for tax exempt status under MCL 205.94k. Statutory construction presents a question of law, which this Court reviews de novo. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). This Court also reviews de novo a lower court's grant or

[1] UPS also claimed a partial refund of sales tax paid on four brown vans purchased in Michigan during 1999. The partial sales tax exemption employed the same pertinent language as the use tax exemption at issue and has since been repealed. See 1996 PA 576, repealed by 1999 PA 116.

denial of summary disposition. *Id*. Because the facts are not disputed, our review of the Tax Tribunal's interpretation and application of the statute to those facts is also de novo. *Id*.; *Danse Corp v Madison Hts*, 466 Mich 175, 178; 644 NW2d 721 (2002). Moreover, our review is de novo even though we give respectful consideration to the department's interpretation of the statute. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90; 754 NW2d 259 (2008).

For the tax years relevant to these cases, MCL 205.94k provided, in part:

> (2) For taxes levied after December 31, 1992 *and before May 1, 1999*, the tax levied under this act does not apply to the storage, use, or consumption of rolling stock used in interstate commerce and purchased, rented, or leased *outside of this state* by an interstate motor carrier. . . .
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> * * *
>
> (4) As used in this section:
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> * * *
>
> (b) "Interstate motor carrier" means a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines, whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year.
>
> (c) "Out-of state usage percentage" is a fraction, the numerator of which is the number of miles driven outside of this state in the immediately preceding tax year by qualified trucks used by the taxpayer and the denominator of which is the total miles driven in the immediately preceding tax year by qualified trucks used by the taxpayer. Miles driven by qualified trucks used solely in intrastate commerce shall not be included in calculating the out-of-state usage percentage.

> (d) "Qualified truck" means a commercial motor vehicle power unit that has 2 axles and a gross vehicle weight rating in excess of 10,000 pounds or a commercial motor vehicle power unit that has 3 or more axles.
>
> (e) "Rolling stock" means a qualified truck, a trailer designed to be drawn behind a qualified truck, and parts affixed to either a qualified truck or a trailer designed to be drawn behind a qualified truck. [1996 PA 477, amended effective June 25, 1999, by 1999 PA 70 (deleting the italicized language).]

No material facts are disputed in either of the cases at bar. Both UPS and AMF are "interstate motor carriers" that operate "rolling stock" in the state of Michigan. Thus, the sole issue on appeal is whether, as a matter of law, the "rolling stock" of UPS and AMF is "used in interstate commerce" so as to be exempt from use tax under MCL 205.94k.

The main goal of judicial construction of a statute is to "ascertain and to give effect to the intent of the Legislature." *United Parcel Service, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007). The first step in doing this is to review the language of the statute. *Id*. If the statutory language of the statute is unambiguous, then we assume that the Legislature intended its plain meaning, and the statute must be enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). "A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Id*.; see also *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007) (The judiciary may not speculate regarding the Legislature's intent beyond those words expressed in the statute.) A provision in a statute "is ambiguous only if it irreconcilably conflicts with another provision,

or when it is *equally* susceptible to more than a single meaning." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004) (citation and punctuation omitted; emphasis in original).

When reading a statute, we must assign to every word or phrase its plain and ordinary meaning unless otherwise defined in the statute, or unless the Legislature has used "technical words and phrases . . . [that] may have acquired a peculiar and appropriate meaning in the law." MCL 8.3a; *Ford Motor Co v Woodhaven*, 475 Mich 425, 438-439; 716 NW2d 247 (2006); *Village of Holly v Holly Twp*, 267 Mich App 461, 470; 705 NW2d 532 (2005). Furthermore, we must not read a word or phrase of a statute in isolation; rather, each word or phrase and its placement must be read in the context of the whole act. *Lansing Mayor*, *supra* at 167-168; *Village of Holly*, *supra* at 470. Consequently, this Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

We read the words "interstate commerce" in the phrase "used in interstate commerce" in the context of its placement and part of the whole of 1996 PA 477, as amended. Specifically, the Legislature enacted a use tax exemption applicable only to an "interstate motor carrier," defined as "a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines." Further, the act recognizes that such interstate motor carriers will likely engage in business activities that occur both within and without the state of Michigan and establishes a percentage requirement

for business outside the state for the exemption to apply. In other words, the Legislature was clearly cognizant of, and capable of crafting, requirements regarding the crossing of state lines with respect to the phrase, "used in interstate commerce," but it did not. Moreover, when enacting legislation, the Legislature is presumed to be fully aware of existing laws, including judicial decisions. See *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993), and *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). Thus, in light of this context, we hold that the only reasonable reading of the words "interstate commerce" as used in 1996 PA 477, as amended, is that the Legislature intended them to have the "peculiar and appropriate meaning in the law" that those words have acquired in over a century of judicial decisions applying the Commerce Clause of the United States Constitution.[2] MCL 8.3a; *Ford Motor Co*, *supra* at 439; *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 606-607; 673 NW2d 111 (2003).

Caselaw spanning over 100 years establishes that the term "interstate commerce" has acquired a technical meaning in the law such that the phrase "used in interstate commerce" refers to trade in goods or services between different states. See *The Daniel Ball*, 77 US (10 Wall) 557, 565; 19 L Ed 999 (1871) (steamer engaged in interstate commerce, even if it never left the

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[2] The United States Constitution grants Congress the power: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." US Const, art I, § 8, cl 3. "The Commerce Clause 'prohibits discrimination against interstate commerce . . . and bars state regulations that unduly burden interstate commerce.' " *Rayovac Corp v Dep't of Treasury*, 264 Mich App 441, 443; 691 NW2d 57 (2004), quoting *Quill Corp v North Dakota*, 504 US 298, 312; 112 S Ct 1904; 119 L Ed 2d 91 (1992). This, of course, is all the more reason for the Legislature to be mindful of the meaning that the words "interstate commerce" have acquired through Commerce Clause litigation.

confines of the state, so long as it carried goods destined for, or originating from, another state); *Northern Pacific R Co v Washington ex rel Atkinson*, 222 US 370, 375; 32 S Ct 160; 56 L Ed 237 (1912) (train moving solely within a single state was engaged in interstate commerce because it hauled goods originating from, or destined for, locations outside the state, "despite the fact that it may also have been carrying some local freight"); *United States v Yellow Cab Co*, 332 US 218, 228; 67 S Ct 1560; 91 L Ed 2010 (1947) ("When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character."); *Martin v Airborne Express*, 16 F Supp 2d 623, 628 (ED NC, 1996) (carrier moving goods solely within a state is moving interstate commerce if part of a larger travel scheme evincing continuity of movement between states). Courts have consistently found that even if a vessel or vehicle never leaves a state, it is "used in interstate commerce" if it carries goods moving in a continuous stream from an origin in one state to a destination in another. See *The Daniel Ball*, *supra* at 565; *Northern Pacific R Co*, *supra* at 375; *Yellow Cab Co*, *supra* 228; *Auclair Transportation, Inc v State*, 113 NH 231, 233; 305 A2d 662 (1973) (motor transportation conducted solely within one state may be interstate commerce if it is part of a continuous movement in interstate commerce).

On the basis of the foregoing, we conclude that the Court of Claims did not err by relying on *The Daniel Ball* and its progeny to rule that the "rolling stock" of UPS was "used in interstate commerce" within the meaning of the use tax exemption of MCL 205.94k. Moreover, we would reach the same conclusion were we

not to ascribe to the Legislature the well-established meaning of "interstate commerce" utilized in over a century of judicial decisions.

The statute does not define the phrase "used in interstate commerce." When the Legislature does not define terms in a statute, courts may consult a dictionary to learn their "common and approved usage." MCL 8.3a; *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). The *Random House Webster's College Dictionary* (1997) defines the adjectival form of "interstate" as "connecting or involving different states." The word "interstate" describes "commerce." The *Random House Webster's College Dictionary* defines "commerce" as "an interchange of goods or commodities between different countries or between areas of the same country; trade." Giving the phrase its plain and ordinary meaning, the words "used in interstate commerce" in MCL 205.94K(2) mean rolling stock used in the trade of goods (commerce) between different states (interstate). Accordingly, we conclude that the phrase "used in interstate commerce" is unambiguous. Any rolling stock that is used to carry the persons or property that are the objects of commerce from a point outside the state to a point inside the state or from a point inside the state to a point outside the state is "used in interstate commerce." The plain language of the statute contains no requirement that the implements of moving the objects of commerce from point to point, i.e., the rolling stock, must also cross state lines. Consequently, we must reject the department's argument to the contrary because "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts*, *supra* at 63. Both UPS and AMF qualify for the use tax exemption because their rolling stock, despite not leaving the state, is

used in the trade of goods between different states: both the UPS brown vans and the AMF delivery trucks transport freight originating from or destined for locations outside Michigan.[3]

The department's other arguments also fail. The department argues that while tax statutes are generally construed against the government, tax exemptions are to be strictly construed in favor of the taxing unit. See *JW Hobbs Corp v Dep't of Treasury*, 268 Mich App 38, 43; 706 NW2d 460 (2005). Applying this principle, the department argues that its construction of the statute must be accepted because otherwise the exception will swallow the rule. But as we have discussed, whether we employ the plain ordinary meaning of the terms used in the statute or the peculiar meaning in the law of the term "interstate commerce," there is no basis for a "strict" or "liberal" construction of the statute; rather, we enforce its unambiguous terms as we must. *Roberts*, *supra* at 63; *United Parcel Service, Inc*, *supra* at 202-203.

We also find misplaced the department's reliance on *American Trucking Ass'ns, Inc v Michigan Pub Service Comm*, 545 US 429; 125 S Ct 2419; 162 L Ed 2d 407 (2005) (*ATA*), to suggest that the Court has altered the meaning of "interstate commerce" developed in *The Daniel Ball* and its progeny. In *ATA*, the Court rejected a Commerce Clause challenge to a flat fee levied on trucks that "engage in intrastate commercial operations—that is, on trucks that undertake point-to-point hauls between Michigan cities." *ATA*, *supra* at 431. Specifically, the two petitioners engaged in *both* interstate and intrastate shipments and argued that

[3] Because the pertinent language is identical, our reasoning applies equally to the partial sales tax exemption at issue in Docket No. 276736. MCL 205.54g; 1996 PA 576, repealed 1999 PA 116.

they engaged in proportionately less intrastate business than trucks that confined operations to the state of Michigan. *Id*. at 432. Thus, the petitioners argued that Michigan's flat fee discriminated against interstate carriers and imposed an unconstitutional burden upon interstate trade. *Id*. Ultimately, the Court determined that nothing about the flat assessment on intrastate activity unfairly discriminated against interstate truckers. *Id*. at 434-438. No issue was raised and decided in *ATA* regarding the meaning of "interstate commerce" or whether trucks hauling both interstate freight and intrastate freight are "used in interstate commerce." Instead, *ATA* addressed a fee on intrastate activity, hauling freight originating in Michigan and staying in this state: "Michigan imposes the flat $100 fee only upon *intrastate transactions*—that is, upon activities taking place *exclusively* within the State's borders." *Id*. at 434 (emphasis added). Nothing in *ATA* casts doubt on the meaning of "interstate commerce" as stated in *The Daniel Ball* and its progeny.

The department also argues that its interpretation of the statute is correct because the construction advanced by UPS and AMF would render part of MCL 205.94k nugatory. Specifically, the department contends that the words "rolling stock used in interstate commerce" are superfluous if all they mean is that a party claiming the exemption must be part of an interstate freight business. We disagree. In order to qualify for the exemption, a party must be an "interstate motor carrier" as defined in subsection b. The department misinterprets the effect of our reading of the statute. The phrase "rolling stock used in interstate commerce" does not mean that a carrier needs only to be part of an interstate freight business to obtain exempt status. Rather, it is possible that a vehicle is part of an interstate freight business but does not qualify for the exemption because it is not

used in interstate commerce, i.e., it carries no interstate goods or services. To qualify for the use tax exemption the rolling stock must be both used in interstate commerce *and* purchased, leased, or rented by an interstate motor carrier, as defined in subsection b. Thus, no part of the statute is rendered nugatory.

Although the department does not adopt the Tax Tribunal's analysis, we review the tribunal's reasoning in Docket No. 276511. First, the tribunal erred by relying on *Bob-Lo Co v Dep't of Treasury*, 112 Mich App 231; 315 NW2d 902 (1982), to accept the department's position that the phrase "used in interstate commerce" requires the crossing of state lines. *Bob-Lo* is inapposite because it considered a use tax exemption related to vessels engaged exclusively in interstate commerce, not rolling stock used in interstate commerce. The exemption at issue in *Bob-Lo*, adopted by 1978 PA 262, provides:

> A vessel designed for commercial use of registered tonnage of 500 tons or more, when produced upon special order of the purchaser, and bunker and galley fuel, provisions, supplies, maintenance, and repairs for the exclusive use of a vessel of 500 tons or more engaged in interstate commerce. [MCL 205.94(k), now MCL 205.94(j).]

The plaintiff corporation in *Bob-Lo* operated two pleasure steamers between points in Michigan and in Canada. The plaintiff contended that it qualified for the exemption. But a previous Michigan Supreme Court decision, affirmed by the United States Supreme Court, held that the plaintiff was engaging in *foreign* commerce.[4] *Bob-Lo Co*, *supra* at 242. The plaintiff argued, however, that it was also engaged in interstate commerce. The *Bob-Lo* Court disagreed for two reasons: (1)

[4] *People v Bob-Lo Excursion Co*, 317 Mich 686, 691; 27 NW2d 139 (1947), aff'd 333 US 28 (1948).

given the prior decision, the plaintiff's activity constituted foreign commerce and (2) the exemption was intended to include vessels that were engaged exclusively in interstate commerce. *Id*. at 244. Although the Court's opinion incorrectly refers to *The Daniel Ball* as involving intrastate activity, which the tribunal quotes, the opinion also correctly states the facts and holding of that case in the prior paragraph. *Bob-Lo Co*, *supra* at 244. At any rate, the *Bob-Lo* decision is inapposite because the Court could not and did not alter United States Supreme Court precedent, interpreted a different statutory provision with substantially different language from the exemption involved in the present cases, and was decided on the basis that the activity in *Bob-Lo* was foreign commerce, not interstate commerce.

We also conclude that the tribunal improperly relied on the department's Internal Policy Directive (IPD) 2003-1 in ruling that trucks must cross state lines to be deemed being used in interstate commerce. Generally, courts give respectful consideration to an agency's interpretation of a statute it executes and will not overturn that interpretation without cogent reasons. *In re Complaint of Rovas*, *supra* at 130; *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 50; 703 NW2d 822 (2005). Nevertheless, an agency's interpretation that is contrary to the statute's plain meaning is not controlling. *Id*.; *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-24; 678 NW2d 619 (2004). In this case, the department's IPD states, "If a truck or trailer operates only in Michigan, it is not being used in interstate commerce." In support of this interpretation, the IPD cites the statutory definition of "interstate motor carrier." The IPD reasons that the definition does not depend on the percentage of freight that the carrier may ship outside the state, but on whether the

carrier's "fleet mileage was driven at least 10% outside" of Michigan. According to the IPD, it follows that the rolling stock must also be used out of state in order to be used in interstate commerce. This reasoning is flawed because it conflates two distinct requirements of the statute: (1) that rolling stock must be "used in interstate commerce" and (2) that the party claiming the exemption must be an "interstate motor carrier" that satisfies the 10 percent criterion. The IPD improperly imports the definition of "interstate motor carrier" to the definition of "interstate commerce" to reach the incorrect conclusion that in order for rolling stock to be used in interstate commerce, it must cross state lines. As discussed already, the plain language of the statute does not contemplate this result. Because the department's IPD is contrary to the plain meaning of the statue, we have the most cogent of reasons to reject it. *In re Complaint of Rovas*, *supra*; *Catalina Marketing Sales Corp*, *supra* at 23-24.

We reverse in Docket No. 276511; we affirm in Docket No. 276736. We remand each case for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

ALLEN v BLOOMFIELD HILLS SCHOOL DISTRICT

Docket No. 275797. Submitted March 12, 2008, at Detroit. Decided September 23, 2008, at 9:15 a.m. Leave to appeal sought.

Charles and Lisa Allen brought an action in the Oakland Circuit Court against the Bloomfield Hills School District, invoking the motor-vehicle exception to governmental immunity from tort liability to seek damages for noneconomic loss under the no-fault act, MCL 500.3135, for an alleged brain injury sustained by Charles Allen (hereafter the plaintiff) and manifested by post-traumatic stress disorder (PTSD) as a result of a collision between a train he was operating and a school bus owned by the defendant. The court, Nanci J. Grant, J., granted summary disposition for the defendant, ruling that the plaintiffs had not established that the plaintiff had sustained a bodily injury within the meaning of the motor-vehicle exception, MCL 691.1405. The plaintiffs appealed.

The Court of Appeals *held*:

1. Under MCL 691.1405 and MCL 500.3135, a plaintiff must show both bodily injury and serious impairment of body function to recover damages.

2. "Bodily injury," as used in MCL 691.1405, simply means a physical or corporeal injury to the body. The plaintiffs in this case presented sufficient evidence to create a genuine issue of material fact concerning whether the plaintiff sustained a bodily injury. One physician who reviewed a positron emission tomography scan of the plaintiff's brain stated that the scan depicted decreases in frontal and subcortical activity consistent with depression and PTSD and that the abnormalities in the plaintiff's brain are consistent with an injury to the brain. Another physician stated that PTSD causes significant changes in brain chemistry, brain function, and brain structure. The medical evidence was sufficient to create a genuine issue of material fact such that summary disposition should not have been granted to the defendant.

Reversed and remanded for further proceedings.

HOEKSTRA, J., concurring in part and dissenting in part, agreed with the majority that a plaintiff seeking to avoid governmental immunity and recover third-party no-fault damages from a gov-

ernmental agency must establish "bodily injury" within the meaning of MCL 691.1405. However, he disagreed that the plaintiffs have established that the plaintiff sustained a bodily injury. The plaintiff's PTSD is alleged to have been caused by emotional upset rather than physical impact to his body. Any changes to the plaintiff's brain functions is properly characterized as a mental, emotional, or psychiatric injury rather than a bodily injury. The trial court properly granted summary disposition for the defendant.

1. GOVERNMENTAL IMMUNITY — MOTOR-VEHICLE EXCEPTION — BODILY INJURY — NO-FAULT ACT — SERIOUS IMPAIRMENT OF BODY FUNCTION.

A plaintiff must show both bodily injury, within the meaning of the motor-vehicle exception to governmental immunity from tort liability, and serious impairment of body function, within the meaning of the no-fault act, in order to recover noneconomic damages for injury sustained as a result of the operation of a government-owned motor vehicle (MCL 500.3135, 691.1405).

2. GOVERNMENTAL IMMUNITY — MOTOR-VEHICLE EXCEPTION — BODILY INJURY — BRAIN INJURIES.

A governmental agency is liable for bodily injury or property damage resulting from the negligent operation by an agency employee of an agency-owned motor vehicle; bodily injury is a physical or corporeal injury to the body; the brain is part of the body and it can be injured physically through direct or indirect trauma (MCL 691.1405).

Pearlman and Pianin (by *Arvin J. Pearlman* and *Elaine L. Livingway*) for the plaintiffs.

Clark Hill PLC (by *Robert A. Lusk* and *Neil H. Goodman*) for the defendant.

Before: SERVITTO, P.J., and HOEKSTRA and MARKEY, JJ.

MARKEY, J. In this suit alleging negligent operation of a governmentally owned and operated school bus, plaintiffs, Charles and Lisa Allen, appeal by right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity because Charles had not suffered a

"bodily injury." We agree with the trial court that a plaintiff seeking to avoid governmental immunity from tort liability through the motor vehicle exception, MCL 691.1405, must establish a "bodily injury." Here, however, plaintiffs presented objective medical evidence that Charles Allen suffered a brain injury, specifically post traumatic stress disorder as a result of the accident. If believed, we conclude that this evidence would establish a "bodily injury" within the meaning of MCL 691.1405; consequently, the trial court erred in granting defendants summary disposition on this issue. Therefore, we reverse.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff Charles Allen (Allen) was operating a train near the intersection of Kensington and Opdyke roads in the city of Bloomfield Hills when he observed a Bloomfield Hills School District (the district) school bus enter the railroad-grade crossing at Opdyke Road and attempt to proceed across the grade by maneuvering around the lowered gate. The train, which was traveling at a speed of approximately 65 miles an hour, was unable to stop and collided with the school bus. After stopping the train and running approximately one-half mile back to the accident scene, Allen was informed that there were no children on the bus at the time of the accident, but that the bus driver was severely injured. Allen was subsequently diagnosed with post traumatic stress disorder (PTSD) stemming from the accident. Allen and his wife filed this suit for recovery of noneconomic and excess economic damages alleging Allen had suffered a serious impairment of body function.[1] MCL 500.3135. But the trial court concluded that Allen did not suffer a "bodily injury" within the meaning of the

[1] Plaintiff Lisa Allen also sought damages for loss of consortium.

motor vehicle exception to governmental immunity, MCL 691.1405, and granted defendant summary disposition.

II. ANALYSIS

Plaintiffs argue that the trial court's ruling was erroneous because the clear and unambiguous language of MCL 500.3135 controls this case, rather than the language of the motor vehicle exception to governmental tort immunity, MCL 691.1405. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Davis v Detroit*, 269 Mich App 376, 378; 711 NW2d 462 (2006). MCR 2.116(C)(7) permits summary disposition of a claim that is barred by immunity granted by law. In reviewing a motion under MCR 2.116(C)(7), a court is required to consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence, *Davis*, *supra* at 378, which must in turn be considered in a light most favorable to the nonmoving party, *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). The trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005).

The proper interpretation of statutes is also a question of law reviewed de novo on appeal. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). When interpreting statutory language, courts must ascertain the

legislative intent that may reasonably be inferred from the words in a statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is neither necessary nor permitted. *Id*. Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that renders nugatory or surplusage any part of a statute. *Id*. Undefined words in a statute should be accorded their plain and ordinary meanings, and dictionary definitions may be consulted in such situations. *Id*.

A governmental agency is generally immune from tort liability arising out of the exercise or discharge of its governmental functions. MCL 691.1407(1). This would include a public school district's operation of a bus system. *Cobb v Fox*, 113 Mich App 249, 257; 317 NW2d 583 (1982). But the broad immunity afforded by the statute is limited by several narrowly drawn exceptions. *Jackson v Detroit*, 449 Mich 420, 427; 537 NW2d 151 (1995). One of these exceptions, at issue here, is that for motor vehicles: "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . ." MCL 691.1405.

Plaintiffs do not dispute, as the statute unequivocally provides, that the exception is limited to "bodily injury" and "property damage." See *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008). Plaintiffs argue that notwithstanding these limitations, Allen was not required to establish a "bodily injury" to avoid governmental immunity because our Supreme Court determined in *Hardy v Oakland Co*, 461 Mich

561, 565; 607 NW2d 718 (2000), that the limitations on tort liability in the no-fault act stated in MCL 500.3135 control the broad statement of liability set forth in MCL 691.1405.

The no-fault act provides in part:

> (1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> * * *
>
> (3) *Notwithstanding any other provision of law*, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect is abolished except as to:
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> * * *
>
> (b) Damages for noneconomic loss as provided and limited in subsections (1) and (2).
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections. [MCL 500.3135 (emphasis added).]

In *Hardy, supra* at 562-563, the plaintiff filed suit against Oakland County for noneconomic damages after one of the county's sheriff's deputies rear-ended his car. The plaintiff argued that because he sued the county under the motor vehicle exception to governmental immunity, he was not obligated to show a serious impairment of a body function under the no-fault act. *Id.* at 563. The Court disagreed, reasoning that the phrase "Notwithstanding any other provision

of law," MCL 500.3135(3),[2] "reflects the Legislature's determination that the restrictions set forth in the no-fault act control the broad statement of liability found in the immunity statute." *Id.* at 565. From this analysis, the Court determined that the plaintiff in *Hardy* was required to show a serious impairment of a body function, the threshold for a tort action for noneconomic damages under the no-fault act. *Id.* at 566.

Plaintiffs' reliance on *Hardy* is misplaced. The issue in *Hardy* was not whether the plaintiff had to show "bodily injury" to invoke the motor vehicle exception to governmental immunity stated in MCL 691.1405, but whether he *also* had to satisfy the serious impairment of body function threshold for tort liability under the no-fault act, MCL 500.3135. In holding that the plaintiff did, our Supreme Court did not determine that a plaintiff pursuing a tort remedy for noneconomic damages under the no-fault act need not meet the requirements of MCL 691.1405. Indeed, such a holding would have been tantamount to stating that the Legislature impliedly repealed MCL 691.1405 to the extent that it pertained to such cases. But a repeal by implication may be found only when there exists a clear conflict between two statutes that precludes their harmonious application. *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996); *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491-492; 618 NW2d 1 (2000). The plain language of MCL 691.1405 and MCL 500.3135 may be read harmoniously to provide that a plaintiff may avoid governmental immunity if he suffers "bodily injury" under the motor vehicle exception of MCL 691.1405, but he must also satisfy the

[2] As stated in *Hardy*, *supra* at 565 n 10, this phrase was formerly contained in MCL 500.3135(2), but is now contained in MCL 500.3135(3) pursuant to 1995 PA 222.

no-fault act threshold for bringing a third-party tort claim, i.e., a plaintiff must establish a serious impairment of a body function as stated in MCL 500.3135. Thus, we must reject plaintiffs' argument that Allen was not required to show a "bodily injury" within the meaning of MCL 691.1405 for the motor vehicle exception to governmental immunity to apply to his tort claim against the district.

The question remains whether plaintiff met his burden of showing a "bodily injury" within the meaning of MCL 691.1405. Because the statute does not define the term "bodily injury," we resort to dictionary definitions and accord the term its plain and ordinary meaning. *Koontz, supra* at 312. *Random House Webster's College Dictionary* (2001) defines "bodily" as "of or pertaining to the body" and "corporeal or material, as contrasted with spiritual or mental." It defines "injury" as "harm or damage done or sustained, esp. bodily harm." Black's Law Dictionary (7th ed), p 789, also defines "bodily injury" as "[p]hysical damage to a person's body." Our Supreme Court in *Wesche*, *supra* at 84-85, applied a similar analysis to the words "bodily injury" in MCL 691.1405. The Court held that " 'bodily injury' simply means a physical or corporeal injury to the body." *Wesche*, *supra* at 85. Consequently, the Court held that "because loss of consortium is a nonphysical injury, it does not fall within the categories of damage for which the motor-vehicle exception waives immunity." *Id*.

Plaintiff argues that he suffered a "bodily injury" because the accident caused physical damage to his body as evidenced by a positron emission tomography (PET) scan of his brain. He relies on the affidavit of Dr. Joseph C. Wu, who reviewed plaintiff's PET scan and opined that it depicted "decreases in frontal and subcortical activity consistent with depression and post

traumatic stress disorder." Dr. Wu further opined that "the abnormalities in Mr. Allen's brain as depicted on the September 8, 2006, PET scan are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are also consistent with an injury to Mr. Allen's brain." Dr. Wu related the abnormalities to the January 13, 2004, accident. Plaintiff also relies on the report of Dr. Gerald A. Shiener, who opined that PTSD "causes significant changes in brain chemistry, brain function, and brain structure."

The brain is a part of the human body, so "harm or damage done or sustained" is injury to the brain and within the common meaning of "bodily injury" in MCL 691.1405, as elucidated in *Wesche*. The question on appeal then becomes, for purposes of reviewing the trial court's grant of summary disposition to defendant, whether plaintiff produced sufficient evidence to create a material question of fact that he suffered a "bodily injury" as so defined. In doing so, we must still adhere to the court rules and follow the law. We must review any evidence of a claimed "bodily injury" in a light most favorable to the nonmoving party. Also, we must conduct our review with common sense, and with cognizance of modern medical science and the human body. Here, plaintiff presented objective medical evidence that a mental or emotional trauma can indeed result in physical changes to the brain.

Although the brain is the organ responsible for our thoughts and emotions, it is also the organ that controls all our physical functions. The fact that it serves more than one function hardly detracts from the fact that it is one of our major organs. It can be injured. It can be injured directly and indirectly. It can be injured by direct and indirect trauma. What matters for a legal analysis is the existence of a manifest, objectively

measured injury to the brain. Consequently, to survive a motion for summary disposition, we must determine whether plaintiff produced sufficient evidence that Allen suffered from an objectively manifested physical injury to his brain.

Plaintiff Allen underwent a PET scan of his brain. When Dr. Wu reviewed plaintiff's PET scan, he concluded that it demonstrated "decreases in frontal and subcortical activity consistent with depression and post traumatic stress disorder" and that "the abnormalities in . . . Allen's brain as depicted on the . . . PET scan *are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are also consistent with an injury to Mr. Allen's brain.*" (Emphasis added.) Plaintiff's other expert doctor, Dr. Shiener, essentially corroborated Dr. Wu's conclusion and indicated that PTSD "causes significant changes in brain chemistry, brain function and brain structure. The brain becomes 'rewired' to overrespond to circumstances that are similar to the traumatic experience." So, two separate medical doctors provided evidence that Allen suffered an injury to his brain.

We must view this evidence in the light most favorable to the nonmoving party to assess whether reasonable minds could not differ. It is evident that with this proffered evidence reasonable minds could most certainly differ about whether plaintiff suffered a "bodily injury." We therefore conclude that this evidence is adequate, at least, to preclude summary disposition because there exists a genuine issue of material fact. In the instant case, Dr. Wu's affidavit testimony along with Dr. Shiener's report was sufficient to create a genuine issue of material fact regarding whether plaintiff suffered a "bodily injury."

We find unpersuasive the dissent's reliance on the rationale of *Bobian v CSA Czech Airlines*, 232 F Supp

2d 319 (D NJ, 2002), that because all thoughts and emotions are connected to brain activity, accepting plaintiff's injury as a "bodily injury" would require completely breaking down the barrier between emotional and physical harms. First of all, the *Bobian* court did not interpret our Michigan statute; it analyzed the term "bodily injury" with respect to air carrier liability under Article 17 of the Warsaw Convention. Moreover, lower federal court decisions are not binding precedent in this Court. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 716; 742 NW2d 399 (2007). But just as important, we find the analysis in *Bobian* profoundly superficial and contrived.

The Legislature has not defined the words "bodily injury" as used in MCL 691.1405. That is why this Court and our Supreme Court in *Wesche* looked to dictionary definitions for guidance in ascertaining their plain and ordinary meanings. And, unless one reads into both the ruling in *Wesche* and the term "bodily injury" in the statute the requirement that an injury ensue solely from *direct* trauma, the dissent significantly alters the definition of "bodily injury" in a manner inconsistent with both the plain wording of the statute and our Supreme Court's interpretation of that term in *Wesche*.

We also note that the dissent appears to concede that indeed plaintiff has an objectively verified brain injury. Its problem seems to be that plaintiff suffered no direct blow to the head, as the cause of the brain injury. Ironically, just a few years ago, the courts in this state had a difficult time understanding and accepting what is now also a universally recognized medical phenomenon and one suffered by thousands of our soldiers: closed head injuries. As we on the bench struggled with how long or whether one had to be rendered uncon-

scious or what tests were sufficient to demonstrate the nature and severity of a closed head injury—including whether MRIs were legally cognizable evidence—the medical community was already a long way down the road in developing treatments and strategies for coping with these mere "mental, emotional," or "psychiatric" injuries. But as a matter of medicine and law, there should be no difference medically or legally between an *objectively* demonstrated brain injury, whether the medical diagnosis is a closed head injury, PTSD, Alzheimer's, brain tumor, epilepsy, etc. A brain injury is a "bodily injury." If there were adequate evidence of a brain injury to meet the requisite evidentiary standards, i.e., objective medical proof of the injury, summary disposition was improper.

In sum, plaintiff here presented sufficient objective medical evidence to raise a material question of fact regarding whether he suffered a brain injury from the accident and whether such brain injury is an injury to the body. Consequently, the trial court erred by granting defendants summary disposition on this issue.

We reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO, P.J., concurred.

HOEKSTRA, J. *(concurring in part and dissenting in part)*. I agree with the majority's conclusion that a plaintiff seeking to avoid governmental immunity and recover third-party no-fault damages from a governmental agency must establish a "bodily injury" within the meaning of MCL 691.1405. However, I disagree that post traumatic stress disorder (PTSD) can be such an injury.

In *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84-85; 746 NW2d 847 (2008), the Supreme Court addressed the definition of "bodily injury":

> Although the GTLA [governmental tort liability act] does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac,* 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id.* Thus, "bodily injury" simply means a physical or corporeal injury to the body.

Plaintiffs argue that plaintiff Charles Allen suffered a "bodily injury" because the accident caused physical damage to his body, as evidenced by a positron emission tomography (PET) scan of his brain. In making this argument, plaintiffs rely on the affidavit of Joseph Wu, M.D., who reviewed Allen's PET scan and opined that it depicted "decreases in frontal and subcortical activity consistent with depression and post traumatic stress disorder." Wu further opined that "the abnormalities in . . . Allen's brain as depicted on the . . . PET scan are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are also consistent with an injury to Mr. Allen's brain." Wu related the abnormalities to the train-bus accident. Plaintiffs also rely on the report of Gerald Shiener, M.D., who opined that PTSD "causes significant changes in brain chemistry, brain function, and brain structure." Allen's PTSD is alleged to have been caused by the emotional upset resulting from his belief, as the accident was occurring, that his operation of the train

was "about to maim or kill numerous school children," rather than a physical impact on his body during the collision.

In my opinion, plaintiffs' evidence concerning Allen's brain abnormalities does not satisfy the definition of "bodily injury" discussed above. Rather, plaintiffs' evidence demonstrates, at most, mental or psychiatric abnormalities or changes. Although not binding on this Court, I find persuasive the analysis in *Bobian v CSA Czech Airlines*, 232 F Supp 2d 319 (D NJ, 2002), regarding whether PTSD constitutes a "bodily injury" compensable under Article 17 of the Warsaw Convention. There, in addressing the plaintiffs' claim that PTSD constitutes a bodily injury by virtue of the physical effects of PTSD on the brain, the court stated, "Given that all human thoughts and emotions are in some fashion connected to brain activity, and therefore at some level 'physical,' to accept Plaintiffs' argument would be to break down entirely the barrier between emotional and physical harms . . . ." *Id*. at 326. Following this reasoning, any change to Allen's brain functions resulting from the accident is properly characterized as a mental, emotional, or psychiatric injury rather than a bodily injury. Because the term "bodily injury" in MCL 691.1405 does not encompass these types of changes, defendant was immune from suit, including Allen's claim for economic damages and plaintiff Lisa Allen's claim for loss of consortium. As such, I would hold the trial court properly granted summary disposition for defendant.

NEW FREEDOM MORTGAGE CORPORATION
v GLOBE MORTGAGE CORPORATION

Docket No. 274864. Submitted April 9, 2008, at Detroit. Decided August 5, 2008. Approved for publication September 23, 2008, at 9:20 a.m.

New Freedom Mortgage Corporation brought an action in the Wayne Circuit Court against Globe Mortgage Corporation and others, seeking, in part, reimbursement for the amounts that the plaintiff, who is in the business of originating and purchasing residential mortgage loans, paid to Impac Funding Corporation following the default of two loans that New Freedom had funded through Globe. Title insurance policies had been issued to Impac, to whom New Freedom assigned both loans, by defendant Scott W. Kissner Title & Escrow Services, Inc., the issuing agent for defendant Commonwealth Land Title Insurance Company. Impac had foreclosed on the properties after the defaults and then purchased the properties on credit for an amount equal to the unpaid principal and interest on the mortgages plus the costs of foreclosure. Such a purchase is known as a "full credit bid," which satisfies the mortgage debt and extinguishes the mortgage. The plaintiff also asserted claims of fraud against Globe, defendant Gerald J. Chastain, who appraised one of the properties, and other defendants, claiming that the plaintiff's losses resulted from the fraudulent or dishonest acts or omissions of Kissner. Chastain, New Freedom, Globe, and Commonwealth sought summary disposition. Some of the defendants brought cross-actions against some of the other defendants. The court, John A. Murphy, J., granted summary disposition in favor of Chastain, Commonwealth, and Globe. The court held that an indemnity provision in the loan purchase agreement between New Freedom and Globe applied and that Commonwealth, through Kissner, had violated a closing protection letter issued by Commonwealth with regard to the loan that Globe originated to defendant Crystal Solomon. The court held that there was a genuine issue of material fact regarding whether Chastain was negligent in performing his appraisal, but, with respect to Globe and Commonwealth, the court reasoned that New Freedom had suffered no damages because Impac had tendered a "full credit bid," which satisfied the debt. In addition, the court held that the full credit bid rule barred the action against Chastain because

there was no evidence that Chastain had committed fraud. New Freedom appealed from the order dismissing the claims against Solomon and from the order denying New Freedom's motion for summary disposition and granting summary disposition in favor of Globe, Commonwealth, and Chastain and also granting Globe, Commonwealth, and Chastain case evaluation sanctions.

The Court of Appeals *held*:

1. The trial court properly applied the full credit bid rule to bar the plaintiff's claims against Globe, Commonwealth, and Chastain and did not err by granting summary disposition in their favor.

2. The trial court did not err by applying the full credit bid rule to prevent recovery under the loan purchase agreement between the plaintiff and Globe because the plaintiff did not incur any damages.

3. Globe is not liable to the plaintiff under any of the representations and warranties contained in the loan purchase agreement.

4. Commonwealth is not liable to the plaintiff under the closing protection letters that Commonwealth issued to the plaintiff for any of Kissner's violations of the plaintiff's closing instructions.

5. The trial court did not err in holding that the full credit bid rule precluded any recovery with regard to the negligence and fraud claims against Chastain because the plaintiff did not suffer any damages.

6. The issue regarding the award of case evaluation sanctions is moot.

Affirmed.

MORTGAGES — FORECLOSURES — FULL CREDIT BIDS.

A lender that bids at a foreclosure sale is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it; if the credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of the foreclosure, it is a full credit bid; a full credit bid by a mortgagee satisfies the mortgage debt and extinguishes the mortgage.

Jaffe, Raitt, Heuer & Weiss, P.C. (by *Brian G. Shannon* and *Patrice S. Arend*), for New Freedom Mortgage Corporation.

Thomas M. Keranen & Associates, P.C. (by *Mark B. Dickow*), for Globe Mortgage Corporation.

Geoffrey S. Walker, P.C. (by *Geoffrey S. Walker*), for Gerald J. Chastain.

May, Simpson & Strote (by *Thomas C. Simpson* and *Beth I. deBaptiste*) for Commonwealth Land Title Insurance Company.

Before: KELLY, P.J., and OWENS and SCHUETTE, JJ.

PER CURIAM. Plaintiff, New Freedom Mortgage Corporation, appeals as of right the trial court's order dismissing its claims against defendant/cross-defendant Crystal Solomon. Plaintiff also challenges the order denying its motion for summary disposition and granting summary disposition in favor of defendant/cross-plaintiff, Globe Mortgage Corporation (Globe), and defendants Commonwealth Land Title Insurance Company (Commonwealth) and Gerald J. Chastain, and the order granting Commonwealth, Globe, and Chastain case evaluation sanctions. We affirm.

I. BASIC FACTS AND PROCEEDINGS

Plaintiff, who is in the business of originating and purchasing residential mortgage loans, entered into a loan purchase agreement with Globe, who is in the business of originating and brokering residential mortgage loans. Globe originated a loan to Solomon regarding a residential property located on Burns Street in Detroit, and plaintiff funded the loan. Globe also originated a loan to defendant/cross-defendant Douglas Bowers regarding a residential property on Runyon Street in Detroit, and plaintiff funded this loan as well. The issues presented in this appeal arise from these two transactions. Commonwealth, a company that provides title insurance, issued closing protection letters to plaintiff in connection with title insurance it issued

regarding the Solomon and Bowers loans. Defendant Scott W. Kissner Title & Escrow Services, Inc. (Kissner), was the issuing agent. The title insurance policies were issued to Impac Funding Corporation (IFC), to whom plaintiff assigned both loans.

Defendant/cross-defendant Marco Welch worked for Globe as a loan officer, and defendant/cross-defendant Napolean Howard is Solomon's stepbrother. Howard contacted Welch on Solomon's behalf for the purpose of obtaining financing for an investment property for Solomon. At Welch's request, Chastain conducted an appraisal of the Burns Street property and estimated that it was worth $411,000. The purchase price for the Burns Street property was $407,000. At the closing, rather than providing funds, Solomon received a check for $44,612.30 as part of a rehabilitation agreement with the sellers. Solomon indicated that she intended to occupy the home, but Welch entered into a land contract with her to purchase the property, and he occupied the home. Solomon defaulted on her loan, and IFC foreclosed on the property. IFC then purchased the Burns Street property, and an appraisal estimated the property's value at $175,000. IFC paid $199,300 for repairs and sold the property for $420,000. IFC notified plaintiff of its obligation to repurchase the Solomon loan, and plaintiff paid IFC.

Bowers indicated that he intended to occupy the home on the Runyon Street property as his primary residence, but he actually purchased the property for his son, who would not have qualified for financing. The purchase price for the Runyon Street property was $80,000. Bowers defaulted on his loan, and Bankers Trust, a trustee related to IFC, foreclosed on the property. IFC purchased the property, and it was sold for $20,000. Plaintiff indemnified IFC for $47,333.98.

In its complaint, plaintiff sought reimbursement for the amounts it paid IFC, alleging that Globe violated the loan purchase agreement and Commonwealth violated its closing protection letters. Plaintiff also asserted fraud claims against Globe, Chastain, and several other defendants and claimed that its loss resulted from the fraudulent or dishonest acts or omissions of Kissner. Chastain, plaintiff, Globe, and Commonwealth sought summary disposition. The trial court granted Chastain, Commonwealth, and Globe summary disposition. The trial court held that an indemnity provision in the loan purchase agreement between plaintiff and Globe applied and Commonwealth, through Kissner, had violated the closing protection letter regarding the Solomon loan. The trial court held that there was a genuine issue of material fact regarding whether Chastain was negligent in performing his appraisal. However, with respect to Globe and Commonwealth, the trial court reasoned that plaintiff had suffered no damages because IFC had tendered a "full credit bid," which satisfied the debt. With regard to Chastain, the trial court held that the full credit bid rule barred the action because there was no evidence that Chastain had committed fraud.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Zsigo, supra* at 220. Summary disposition is appropriately granted if, except for the amount of

damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*. This Court reviews de novo questions of law, including issues regarding the existence and interpretation of a contract. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

III. FULL CREDIT BID RULE

Plaintiff argues that the trial court erred in granting Globe, Commonwealth, and Chastain summary disposition in reliance on the full credit bid rule, which dictated that plaintiff had suffered no damages. We disagree.

When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. *Alliance Mortgage Co v Rothwell*, 10 Cal 4th 1226, 1238-1239; 44 Cal Rptr 2d 352; 900 P2d 601 (1995). If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a "full credit bid." *Id.* at 1238. When a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 555; 444 NW2d 217 (1989). MCL 600.3280, which addresses deficiencies, provides, in pertinent part, as follows:

> When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser,

> or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.

In its complaint, plaintiff alleged fraud, misrepresentation, and breach of contract, and in its response to Chastain's motion for summary disposition, it asserted that Chastain had been negligent. Fraud and misrepresentation are similar and require proof that

> "(1) defendants made a material representation; (2) it was false; (3) when defendants made it, defendants knew that it was false or made recklessly without knowledge of its truth or falsity; (4) defendants made it with the intent that plaintiffs would act upon it; (5) plaintiffs acted in reliance upon it; and (6) plaintiffs suffered damage." [*Mitchell v Dahlberg*, 215 Mich App 718, 723; 547 NW2d 74 (1996), quoting *Arim v Gen Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994).]

Damages are an element of a breach of contract action. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Shippey v Madison Dist Pub Schools*, 55 Mich App 663, 668; 223 NW2d 116 (1974). The elements of a negligence claim are "duty, breach of that duty, causation, and damages." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Therefore, if there are no damages, it is appropriate to grant sum-

mary disposition on fraud, misrepresentation, breach of contract, and negligence claims.

The trial court relied on *Smith v Gen Mortgage Corp*, 402 Mich 125, 126-127; 261 NW2d 710 (1978), in which the mortgagors were in default and the property was totally destroyed by a fire. After the fire, the mortgagee's assignee bid the full amount of the outstanding debt plus costs and fees. *Id.* at 127. The Court relied on *Whitestone S & L Ass'n v Allstate Ins Co*, 28 NY2d 332, 336; 321 NYS2d 862; 270 NE2d 694 (1971), in which the court held that the mortgagee's full credit bid barred recovery by the mortgagee under an insurance policy when a fire partially destroyed the mortgaged property before the foreclosure sale. Our Supreme Court similarly held that the mortgagee was not entitled to the insurance proceeds. However, because this was a previously unannounced rule, the Court did not apply it to the parties in that case. *Smith*, *supra* at 129-130.

This Court has applied the full credit bid rule in several cases regarding similar insurance proceeds since *Smith*. In *Heritage Fed Savings Bank v Cincinnati Ins Co*, 180 Mich App 720, 724; 448 NW2d 39 (1989), the Court held that the mortgagee was not entitled to fire insurance proceeds when the fire occurred before the foreclosure and the mortgagee purchased the property for an amount greater than the debt at the foreclosure sale. The Court reasoned that the debt had been satisfied and that the *Smith* rule was intended to prevent a mortgagee from receiving a double recovery. *Id.* at 725-726. In *Emmons v Lake States Ins Co*, 193 Mich App 460, 462-463; 484 NW2d 712 (1992), the mortgagee bid the full amount of the outstanding principal and accrued interest at a foreclosure sale following a fire that partially destroyed the secured property. The Court applied *Smith* and stated that,

"[g]enerally, a mortgagee is not entitled to insurance proceeds when a loss occurs before a foreclosure sale in which the mortgagee purchases for a bid which extinguishes the mortgage debt." *Id.* at 463. The mortgagee attempted to claim the insurance proceeds under the mortgagor's assignment of the insurance proceeds, but the Court rejected this argument because the debt had not survived the foreclosure and there was no deficiency. *Id.* at 463-465.

In *Janower v F M Sibley Lumber Co*, 245 Mich 571, 572; 222 NW 736 (1929), the mortgagee purchased the secured property at a foreclosure sale for the full amount of principal, interest, and costs. The mortgagee sought the appointment of a receiver to prevent waste, i.e., for the performance of necessary repairs and the payment of unpaid taxes. *Id.* at 573. Our Supreme Court held:

> The rule of *caveat emptor* applies with full force to this judicial sale. The petitioner, purchaser, took "subject to defects, liens, and incumbrances of which he has notice or of which he could obtain knowledge under his duty to inform himself." It purchased subject to the very tax liens of which it complains, and the premises in the condition of which it complains, and it bid the full amount due. There can be no decree for deficiency. [*Id.* (citation omitted).]

See also *Pulleyblank v Cape*, 179 Mich App 690, 696; 446 NW2d 345 (1989).

In *Bank of Three Oaks*, *supra* at 553, the lender bid the full amount of the mortgage plus costs and fees at a foreclosure sale. The lender attempted to recover the amount of interest on the debt that accrued during the redemption period, as well as insurance, taxes, and fees. *Id.* at 554. This Court held that the lender's purchase for the full amount of indebtedness extinguished the debt and mortgage. *Id.* at 555. The lender also at-

tempted to recover this amount from several individuals who had executed a guarantee. *Id.* at 554. The Court held that the guarantors were not liable because the borrower had never incurred a liability. *Id*. at 558-559. The Court stated that the expenses had arisen from the decision to purchase the property at the foreclosure sale, which was wholly independent from the original transaction covered by the guarantee. *Id.* at 559. Further, the lender's full credit bid meant that there was no deficiency. *Id.* at 561.

In *Chrysler Capital Realty, Inc v Grella*, 942 F2d 160, 161-162 (CA 2, 1991), the mortgagee purchased the secured property at a foreclosure sale for the amount of the entire debt, including accrued interest and costs. The mortgagee then sued the mortgagor and Mabon, Nugent & Co., a partnership that owned 100 percent of one of the limited partners in the mortgagor, and who had also arranged the mortgage loan between the mortgagor and the mortgagee. *Id.* at 161. The mortgagee sought to recover damages because the fair market value of the property was less than the amount of its full credit bid, arguing that Mabon had fraudulently induced it to enter into the loan. *Id.* at 162. The United States Court of Appeals for the Second Circuit applied *Smith*, *Pulleyblank*, and *Bank of Three Oaks*, and declined to create an exception to the full credit bid rule where the underlying mortgage transaction was induced by fraud. *Id.* at 163. Although this Court is not bound by the decisions of the lower federal courts, this decision is persuasive. *Greater Bible Way Temple of Jackson v City of Jackson*, 478 Mich 373, 396; 733 NW2d 734 (2007).

Plaintiff relies on several out-of-state cases where the courts declined to apply the full credit bid rule to bar actions against nonborrower third parties. The leading

case is *Alliance Mortgage*, *supra* at 1232-1235, in which the lender made a full credit bid for secured properties at a foreclosure sale, and it sued its real estate appraiser and broker, title insurers (its fiduciaries), and others, alleging that they had fraudulently induced it to make certain loans to fictitious buyers. After it acquired the properties, the lender learned that the true market value was less than the value that had been represented to it and less than the balance of the mortgage, requiring the lender to perform repairs and incur other costs. *Id.* at 1232-1233. The California Supreme Court acknowledged that the lender generally has a burden to make an informed bid. *Id.* at 1246. However, given the lender's alleged fiduciary relationship with the defendants and the fact that it did not discover the alleged fraud until after the foreclosure sale, the court held that the full credit bid rule did not, as a matter of law, bar its claims. *Id.* at 1245-1248, 1249-1251. Rather, the court stated that the lender could recover against the defendants to the extent that their fraudulent misrepresentations caused its full credit bids and that the lender's reliance on these misrepresentations was appropriate, given the fiduciary relationship, or was not otherwise manifestly unreasonable. *Id.* at 1246-1248. Given that there are no allegations of a fiduciary relationship between plaintiff and Globe, Commonwealth, or Chastain, *Alliance Mortgage* is distinguishable.

At least one California court after *Alliance* has applied the full credit bid rule to nonborrower third parties where fraud was not alleged. See *Pacific Inland Bank v Ainsworth*, 41 Cal App 4th 277, 279-280, 283-284; 48 Cal Rptr 2d 489 (1995) (affirming the application of the full credit bid rule to preclude a lender's recovery against an appraiser for negligence), applying *Cornelison v Kornbluth*, 15 Cal 3d 590; 125 Cal Rptr 557; 542 P2d 981 (1975). In *Pacific Inland Bank*, *supra*

at 283-284, the court reasoned that the lender could have taken appropriate steps to determine the property's value before making its full credit bid and bears the burden of making an informed bid. Although *Alliance* and *Pacific Inland Bank* are not binding on this Court, they are instructive. Further, *Chrysler Capital Realty*, *supra*, supports the conclusion that the full credit bid rule bars fraud actions. Michigan caselaw supports these conclusions.

A mortgagee purchases subject to the condition of the property, and the rule of *caveat emptor* applies. *Janower*, *supra* at 573; *Pulleyblank*, *supra* at 696. Further, as a purchaser at the foreclosure sale, IFC and Bankers Trust stood "in the same position as any other purchaser." *Id.* at 694. If a third party had bid and purchased the properties for the full amount of the mortgages and costs, IFC and Bankers Trust would have received this amount and applied it to the debts. If the third party then discovered that the properties were worth less than the full bids, it would have no recourse against Globe, Commonwealth, or Chastain. The *Smith* rule was intended to prevent a mortgagee from receiving a double recovery. *Heritage Fed Savings Bank*, *supra* at 725-726. Although plaintiff did not actually receive the payments at the foreclosure sales, it assigned both mortgages to IFC for valuable consideration. Therefore, it has already received compensation for the loans. As our Supreme Court has stated, " 'To allow the mortgagee, after effectively cutting off or discouraging lower bidders, to take the property—and then establish that it was worth less than the bid—encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders.' " *Smith*, *supra* at 129, quoting *Whitestone S & L Ass'n*, *supra* at 337 (emphasis omitted). We therefore conclude that the trial court properly applied the full credit bid rule to bar

plaintiff's claims against Globe, Commonwealth, and Chastain, and did not err by granting summary disposition.[1]

IV. LOAN PURCHASE AGREEMENT

Plaintiff also argues that the trial court erred by applying the full credit bid rule to prevent recovery under the loan purchase agreement between plaintiff and Globe. We disagree.

In particular, plaintiff relies on the indemnification provision. The trial court found that the indemnification provision was broad enough to include acts of fraud committed by Welch, an undisputed employee of Globe. Indemnity agreements are construed in the same manner as contracts generally. *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). The indemnification agreement contained in the loan purchase agreement provides, in relevant part:

> Broker agrees to indemnify, defend and hold NEW FREEDOM MORTGAGE CORPORATION harmless from and against any and all claims, losses, costs, or damages, including but not limited to reasonable attorneys' fees and expenses which
>
> a. arise out of any act or omission of Broker or any employee or agent of Broker;
>
> * * *
>
> d. arise out of or in connection with any falsity, incorrectness, or incompleteness in any material respect of any representation or warranty made by Broker herein[.]

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[1] While this result may seem harsh, we note that plaintiff obtained a default judgment against Kissner, Howard, and Welch jointly and severally in the amount of $228,747.55. Further, plaintiff obtained a $13,000 settlement against Solomon and a default judgment against Bowers for $47,333.98, in violation of the full credit bid rule.

When construing a contract, the goal is to ascertain and enforce the parties' intent on the basis of the plain language of the contract. *Real Estate One v Heller*, 272 Mich App 174, 178; 724 NW2d 738 (2006). The loan purchase agreement requires Globe to indemnify plaintiff for any losses or damages arising out of any act or omission of Globe's employees or agents. Therefore, Globe would be liable for Welch's acts or omissions, regardless of whether it was aware of them.[2] However, as discussed in part II of this opinion, the full credit bid rule bars recovery because plaintiff did not incur any damages. Although it claims that it suffered "actual damages," these damages were a direct result of IFC's full credit bid and there is no evidence that IFC's decision to make the full credit bid arose out of Welch's acts or omissions.

We are mindful of the principle of freedom of contract, as discussed by our Supreme Court:

> The rights and duties of parties to a contract are derived from the terms of the agreement. As this Court has previously stated, "The general rule [of contracts] is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts." Under this legal principle, the parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement. Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties. [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62-63; 664 NW2d 776 (2003) (citations omitted).]

Nevertheless, the full credit bid rule overrides the indemnity provision because a mortgagee purchases

[2] Regarding the Bowers loan, there is no evidence that Globe or any of its agents or employees committed any acts or omissions triggering this indemnity provision.

subject to the condition of the property, and a lender who makes a full credit bid stands "in the same position as any other purchaser." *Pulleyblank*, *supra* at 694, and see *Janower*, *supra* at 573, and *Pulleyblank, supra* at 696.

Plaintiff also contends that other provisions contained in a separate part of the loan purchase agreement entitled "Representations and Warranties as to Mortgage Loans" apply because Welch's knowledge of the forgeries and falsities should be imputed to Globe. The trial court held that the other warranties contained in the loan purchase agreement did not apply because there was no evidence that Globe knew of Welch's actions. The other warranties on which plaintiff relies are as follows:

> 1. *To the best knowledge and belief of Broker*, the application has been duly executed, and all of the documents and records relating to the Mortgage Loan are genuine, bona fide and what they purport to be, do not contain forgeries or unauthorized signatures . . . . The documents and records do not fail to disclose any facts which could be material or which would make such information misleading.
>
> * * *
>
> 4. There are no undisclosed agreements *between the borrower and Broker* concerning any facts or conditions, whether past, present or future, which might in any way affect the obligations of the borrower under the Mortgage Loan documents.
>
> 5. Broker has complied with its covenants in Section 4 of the Loan Purchase Agreement, and has disclosed to NEW FREEDOM MORTGAGE CORPORATION *all facts of which Broker has notice* which might have any influence upon the credit decision by NEW FREEDOM MORTGAGE CORPORATION, including without limitation, any information in any way communicated by Borrower or others

> which might not be disclosed in the file documentation. Broker will promptly notify NEW FREEDOM MORTGAGE CORPORATION of any occurrence, act or omission of which Broker receives knowledge or notice, which occurrence, act or omission may materially affect Broker, the Mortgage Loan, the property securing the Mortgage Loan, or the Borrower.
>
> * * *
>
> 13. *To the best knowledge and belief of Broker*, all verifications of employment, deposits, down payment and credit and all names, addresses, amounts, credit information and statements of fact contained in the Mortgage Loan file, and all of the documents submitted in support of the Mortgage Loan are true, correct and bona fide and authentic and are what they purport to be. The Broker has not, and has no knowledge or reason to believe that anyone else had, given anything of value to the appraiser of the property that is collateral for the Mortgage Loan, to affect the appraised value of the subject property, and the appraisal is true, accurate, correct, bona fide and authentic in what it purports to be. [Emphasis added.][3]

Again, we glean the parties' intent from the plain language of the contract. *Real Estate One*, *supra* at 178. In §§ 1 and 13, Globe only warrants those items of which it has knowledge and belief. In § 5, Globe only warrants those facts of which it has notice. Plaintiffs presented no evidence that Globe, through an alleged owner, Basil Yaldo, or its president, Walter A. Yaldo, was

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[3] In its brief on appeal, plaintiff cites §§ 2, 6, 7, and 13 of the representations and warranties part of the loan purchase agreement, but these sections do not apply to plaintiff's issues regarding forgeries in the loan documents, false information regarding occupancy and funds brought to the closing, the side deal between Solomon and Welch, and falsities in the loan documents. In the statement of facts, plaintiff quotes §§ 1, 4, 5, and 13 of the representations and warranties part of the loan purchase agreement, which is consistent with its brief in support of its motion for summary disposition. Therefore, we analyze this issue based on §§ 1, 4, 5, and 13.

aware or had notice of Welch's actions. In § 4, Globe warrants that there are no undisclosed agreements between the buyer (Solomon) and Globe. Although there was a land contract between Solomon and Welch, plaintiff presented no evidence that Globe was a party to this transaction, approved of this transaction, or even had knowledge of this transaction. Globe is not liable to plaintiff under any of these provisions.

Plaintiff claims that Welch's knowledge of his acts should be imputed to Globe. Plaintiff is correct that notice by an agent is generally imputed to the principal. *Turner v Mut Benefit Health & Accident Ass'n*, 316 Mich 6, 21; 24 NW2d 534 (1946); *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 623; 637 NW2d 536 (2001). However, plaintiff overlooks that an employer is only vicariously liable for the acts its employees commit while performing a duty within the scope of employment, and an employer is not liable for " 'torts intentionally or recklessly committed by an employee beyond the scope of his master's business.' " *Rogers v J B Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002) (citation omitted). Therefore, it is unlikely that Globe could be vicariously liable for Welch's acts, outside the indemnification provision. In any event, as discussed in part III of this opinion, the full credit bid rule bars recovery because plaintiff did not incur any damages.

With respect to the Bowers loan, plaintiff has not presented any evidence that Globe or any of its employees or agents was aware that he did not intend to occupy the property. Therefore, Globe is not liable to plaintiff under these provisions of the loan purchase agreement.

V. CLOSING PROTECTION LETTERS

Plaintiff argues that the trial court erred in applying the full credit bid rule to prevent recovery under the

closing protection letters that Commonwealth issued to plaintiff. We conclude that Commonwealth is not liable to plaintiff under the closing protection letters for Kissner's violations of plaintiff's closing instructions.

A closing protection letter is typically issued by a title insurance underwriter "[t]o verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors or dishonesty with escrow or closing funds." 2 Palomar, Title Ins Law, § 20:11. These letters are issued incidentally to title insurance, and they are "to persuade customers to trust their agents, so that their policies can be sold." *Id.*, § 20:13. Thus, consideration is given, i.e., the purchase of the insurance policy, and a breach of contract action may be maintained independent of the title insurance policy. *Id.* The pertinent language of the closing protection letters Commonwealth issued regarding the two properties in this case is as follows:

> When title insurance of Commonwealth Land Title Insurance Company is specified for your protection in connection with closings of real estate transactions in which you are to be . . . a lender secured by a mortgage (including any other security instrument) of an interest in land, the Company, subject to the conditions and exclusions set forth below, hereby agrees to reimburse you for actual loss incurred by you in connection with such closings when conducted by the Issuing Agent referenced herein (an agent authorized to issue title insurance for the Company), and when such loss arises out of:
>
> 1. *Failure of the Issuing Agent to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land, including the obtaining of documents and the disbursement of funds necessary to*

> *establish such status of title or lien, or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or*
>
> 2. *Fraud or dishonesty of the Issuing Agent in handling your funds or documents in connection with such closings*. [Emphasis added.]

We ascertain the parties' intent from the plain language of the contract. *Real Estate One*, *supra* at 178. Plaintiff contends that Commonwealth is liable for Kissner's violations of plaintiff's closing instructions. In pertinent part, plaintiff's closing instructions regarding the Solomon loan provided that the attachment to the HUD-1 settlement statement and the application must be fully and properly executed and the maximum cash to close was $47,100. The instructions also required that the HUD-1 settlement statement "must be completed properly and completely. It must reflect all applicable charges, costs, refunds, addresses, and proration dates."

Scott Kissner, the sole officer and director of Kissner, asserted that Globe, presumably Welch, provided a cashier's check for $46,387.70 at closing, but this check was never used. Rather, Scott Kissner explained that he believed the check had been presented to convince plaintiff that Solomon had provided these funds, which she never did. Instead, Solomon received a check for $44,612.30 from the sellers through Kissner, as part of a $91,000 rehabilitation agreement with the sellers. The HUD-1 settlement statement for the Solomon transaction indicates that Solomon brought $46,387.70 to the closing and fails to show that she received $44,612.30 from the sellers. On the attachment to the HUD-1 settlement statement, Kissner attested that

funds were disbursed in accordance with the HUD-1 settlement statement, but it allowed the loan to close with knowledge of the $91,000 rehabilitation agreement. Although the closing instructions did not prohibit the sellers from giving Solomon money out of their proceeds, Kissner violated the instructions by failing to require Solomon to tender $46,387.70 and failing to properly execute the attachment to the HUD-1 settlement statement.

On Solomon's loan application, she asserted that she would be occupying the property as her primary residence, which was false. Rather, Welch would be occupying the property pursuant to a land contract with Solomon. Although Kissner was aware of the arrangement between Welch and Solomon two days after the closing, there is no evidence that it was aware of this information at closing. To the contrary, Solomon testified that they did not discuss the property's being an investment property at the closing. Therefore, this did not constitute a violation of the closing instructions.

Applying the closing protection letter to the facts, any failure on Kissner's part to comply with plaintiff's closing instructions did not relate to the title or lien under § 1(a) of the closing protection letter. Although the loan application contained a false statement regarding occupancy, Kissner was aware that the HUD-1 settlement statement was inaccurate, and the attachment to the HUD-1 settlement statement was falsely attested, § 1(b) of the closing protection letter provided that Commonwealth was only liable for documents specifically required by plaintiff and that Commonwealth would not be liable for any determination of the "validity, enforceability or effectiveness of such other document . . . ." Therefore, this provision does not trigger liability.

The trial court found that Kissner had violated § 1(c) of the closing instructions by permitting Solomon to leave the closing without tendering $46,387.70.[4] Paragraph 1(c) applies to "the collection and payment of funds due [plaintiff]." These funds were not due plaintiff; rather, Kissner was supposed to collect them and tender them to the sellers. Therefore, Kissner's violation of the closing instructions does not trigger liability under this paragraph, and Commonwealth was not liable for Kissner's failure to follow plaintiff's closing instructions.

Pursuant to § 2, Commonwealth is liable for Kissner's fraud or dishonesty "in handling [plaintiff's] funds or documents in connection with such closings." Plaintiff presented no evidence that Kissner was aware at closing that Solomon did not intend to occupy the property. Although there were discrepancies in the HUD-1 settlement statement and the attachment to the HUD-1 settlement statement was falsely attested, these documents did not belong to plaintiff. Kissner properly disbursed plaintiff's funds, and there were no shortages. Although Kissner violated the closing instructions and failed to notify plaintiff when it learned that Solomon was not occupying the property, there is no evidence that it committed any fraud or dishonesty in handling funds or documents that belonged to plaintiff. Therefore, § 2 does not apply and Commonwealth is not liable to plaintiff for Kissner's violations of the closing instructions.

Plaintiff also argues that Commonwealth is liable for Kissner's violations of plaintiff's closing instructions regarding the Bowers loan. The closing instructions pertaining to the Bowers loan provided, in relevant

[4] We note that the trial court erroneously referred to this as "Item (3)(b)" in its opinion and order.

part, that the attachment to the HUD-1 settlement statement, the occupancy statement, and the application must be fully and properly executed. The instructions also required that the HUD-1 settlement statement "must be completed properly and completely. It must reflect all applicable charges, costs, refunds, addresses, and proration dates." On his loan application, Bowers falsely asserted that he intended to occupy the property. However, plaintiff failed to present any evidence that Kissner was aware of this falsity, and § 1(b) of the closing protection letter provided that Commonwealth would not be liable for any determination of the "validity, enforceability or effectiveness of such other document . . . ." Given that there is no evidence that Kissner was aware of this misrepresentation, there is no evidence of fraud or dishonesty on Kissner's part, and § 2 does not apply. Therefore, Commonwealth is not liable to plaintiff under the Bowers closing protection letter.

VI. NEGLIGENCE AND FRAUD

Plaintiff argues that the trial court erred in applying the full credit bid rule to plaintiff's claims against Chastain. Although there is a genuine issue of material fact regarding negligence and fraud or misrepresentation, the full credit bid rule precludes recovery because plaintiff did not suffer any damages.

Plaintiff asserted a fraud or misrepresentation claim against Chastain, and Chastain moved for summary disposition, arguing that there was no evidence of conspiracy. Although he cited no law and provided minimal argument, he provided his affidavit and an affidavit by Garrett Steele, a licensed appraiser, both of which constituted evidence that Chastain complied with industry standards in performing the Burns ap-

praisal. In response, plaintiff requested summary disposition and argued that Chastain's failure to follow industry standards constituted prima facie negligence, even though plaintiff had never pleaded negligence. At oral arguments regarding the summary disposition motions, Chastain argued that he had complied with industry standards and there was no evidence of conspiracy. Plaintiff argued that the evidence showed that Chastain was negligent. The trial court found that there was a genuine issue of material fact regarding whether Chastain was negligent, but it concluded that the full credit bid rule could not be defeated because there was no evidence of fraud.

The elements of a negligence claim are "duty, breach of that duty, causation, and damages." *Brown*, *supra* at 552. Duty is "the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury." *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). " 'In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.' " *Id.* (citation omitted). Given that Globe hired Chastain to perform the appraisal for a loan that plaintiff was providing to Solomon, Chastain owed plaintiff a duty in performing his appraisal.

There is no evidence to support plaintiff's assertion that Chastain failed to personally inspect the Burns property. He admitted that Jeff Groff, who is not a licensed appraiser, had taken notes and prepared a diagram during the inspection, but Chastain asserted that he had personally entered the property. Chastain did not note any water or termite damage in his report, and plaintiff provided no evidence that there was any

such damage on the day Chastain appraised the property. But, an appraisal conducted 20 months later (after the foreclosure) showed extensive termite damage from a prior infestation and other reports prepared 23 months later showed water damage from the roof leaking for a period of years. Further, the rehabilitation agreement between Solomon and the sellers may indicate that the property was worth less than Chastain's appraised value. Therefore, there was a genuine issue of material fact regarding whether Chastain breached his duty. There may also be a question of fact regarding causation, i.e., whether IFC relied on Chastain's appraisal in making its full credit bid.

But even if a question of material fact exists regarding duty and causation, as already discussed, damages are also an essential element of a fraud or misrepresentation claim. *Mitchell*, *supra* at 723. Because the full credit bid rule dictates that there are no damages, the trial court properly granted summary disposition on this claim.

Plaintiff also challenges the trial court's ruling regarding fraud, arguing that Chastain had never requested summary disposition on a fraud claim and plaintiff had no notice that it needed to brief this issue. Given that fraud or misrepresentation was the only cause of action pleaded against Chastain, plaintiff had notice that it needed to brief this issue in its response to Chastain's motion.

VII. CASE EVALUATION SANCTIONS

Plaintiff argues that this Court should vacate the order granting case evaluation sanctions if it reverses the order regarding summary disposition. Given our resolution of the foregoing issues and our decision to

affirm the grant of summary disposition in favor of Globe, Commonwealth, and Chastain, this issue is moot.

Affirmed.

In re ROE

Docket No. 283642. Submitted August 6, 2008, at Lansing. Decided September 25, 2008, at 9:00 a.m.

The Department of Human Services petitioned the Chippewa Circuit Court, Family Division, for the termination of the parental rights of Theresa Finfrock to Ashtyn J. Roe. Both the respondent and her daughter are members of the Sault Ste. Marie Tribe of Chippewa Indians, which intervened as a respondent. The court, Lowell R. Ulrich, J., terminated Finfrock's parental rights because one of her children died under suspicious circumstances and her parental rights to another child had been terminated on the basis of serious and chronic neglect or physical abuse, and prior attempts to rehabilitate Finfrock have been unsuccessful, MCL 712A.19b(3)(*i*). The court further found beyond a reasonable doubt that continued custody by Finfrock would have likely resulted in serious emotional or physical damage to the child, § 1912(f) of the Indian Child Welfare Act (ICWA), 25 USC 1912(f). Finfrock appealed.

The Court of Appeals *held*:

1. Section 1912(f) provides that no termination of parental rights to an Indian child may be ordered in the absence of a determination, supported by evidence beyond a reasonable doubt, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. Additionally, § 1912(d), 25 USC 1912(d), provides that any party seeking to effect the termination of parental rights to an Indian child under state law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts proved unsuccessful.

2. The proper standard of proof for determinations under § 1912(d) with respect to active efforts concerning remedial services and rehabilitative programs is proof by clear and convincing evidence.

3. Formal or informal services provided before the current proceeding may meet the "active efforts" requirement of § 1912(d). The ICWA does not require current active efforts if it is clear that past efforts have met with no success. Where there is

clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d). The "active efforts" requirement imposes a requirement on the Department of Human Services to take an involved, rather than a passive, approach when providing remedial services and rehabilitative programs to an Indian family. Finally, the ICWA requires the provider of remedial services or rehabilitative programs to provide culturally relevant services or programs to prevent the breakup of the family.

4. In this case, the trial court failed to make the factual findings required by § 1912(d) in the manner described by the Court of Appeals. The trial court's decision must be reversed and the case must be remanded for further proceedings.

Reversed and remanded for further proceedings.

GLEICHER, J., concurring in part and dissenting in part, agreed with the majority that the "clear and convincing evidence" standard governs whether active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts proved unsuccessful. She also agreed that the circuit court in this case failed to make the required finding that the department made active efforts that proved unsuccessful. However, Judge GLEICHER disagreed with the majority's determination that previous rehabilitative efforts, involving other children and entirely different circumstances, may meet the requirements of § 1912(d). She further disagreed with the conclusion that the circuit court may altogether avoid applying § 1912(d) by deciding that additional services would be futile. The ICWA's "beyond a reasonable doubt" standard of proof for termination of parental rights to an Indian child precludes a presumption of unfitness predicated solely on past conduct. Rather, the court must engage in a meaningful examination of present circumstances to determine whether the continued custody of the child by the parent is likely to result in emotional or physical damage to the child. In the absence of evidence of current active efforts in this case, the trial court's decision must be reversed.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIANS.

No termination of parental rights to an American-Indian child may be ordered unless a court determines beyond a reasonable doubt that continued custody of the child by an Indian parent is likely to result in serious emotional or physical damage to the child and determines by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative

programs designed to prevent the breakup of the Indian family and that the efforts proved unsuccessful (25 USC 1912[d], [f]).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIANS — REMEDIAL SERVICES AND REHABILITATIVE PROGRAMS — ACTIVE EFFORTS TO PREVENT BREAKUP OF INDIAN FAMILIES.

Active efforts at culturally relevant remedial services and rehabilitative programs designed to prevent the breakup of an Indian family, which efforts are required before parental rights to an Indian child may be terminated, may be shown by evidence that past efforts have met with no success or by evidence that the provision of future services and programs would be futile (25 USC 1912[d]).

Brian A. Peppler, Prosecuting Attorney, and *Marsha Teysen*, Assistant Prosecuting Attorney, for the Department of Human Services.

Michigan Indian Legal Services (by *Cameron Ann Fraser*) for Theresa Finfrock.

James A. Bias for the Sault Ste. Marie Tribe of Chippewa Indians.

Before: MARKEY, P.J., and WHITBECK and GLEICHER, JJ.

WHITBECK, J. In this case involving the termination of parental right to an Indian child, respondent Theresa Finfrock appeals as of right the trial court order terminating her parental rights to her daughter Ashtyn Jasmin Roe. The trial court terminated Finfrock's rights after finding that her rights to another child had been terminated because of physical abuse and that prior attempts to rehabilitate her had been unsuccessful.[1] As the Indian Child Welfare Act (the ICWA) requires,[2] the trial court further found that continued custody by Finfrock was likely to result in serious

[1] MCL 712A.19b(3)(i).

[2] 25 USC 1901 *et seq*.

emotional or physical damage to the child.[3] On appeal, Finfrock argues that the trial court erred by failing to require petitioner Department of Human Services (the Department) to prove that it made "active efforts" to provide the remedial services and rehabilitative programs that the ICWA required.[4] Finfrock further argues that the trial court clearly erred when it found that Finfrock's continued custody was likely to result in serious emotional or physical damage to the child. We conclude that the ICWA requires the trial court to make findings regarding whether the Department made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and regarding whether those efforts proved unsuccessful. Because the trial court did not make these findings, we vacate its order terminating Finfrock's parental rights and remand the case for further proceedings consistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

Ashtyn Roe was born to Finfrock and Samuel Roe in October 2007. Ashtyn Roe was Finfrock's third child. Finfrock's first child, Daniel Finfrock, was born in April 1997. Finfrock's second child, Aliyah Bertrand, was born in August 2000.

Daniel Finfrock had several developmental handicaps and required considerable care. In January 2005, he died from intracranial trauma. Finfrock and her then-boyfriend, Steven Perrault, were Daniel Finfrock's only caregivers on the day that he sustained his injuries. Daniel Finfrock's death was later ruled a homicide.

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[3] See 25 USC 1912(f).

[4] See 25 USC 1912(d).

After Daniel Finfrock's death, the Department sought the termination of Finfrock's parental rights to Aliyah Bertrand. And in July 2005, a tribal court terminated Finfrock's rights to Aliyah Bertrand after Finfrock failed to comply with her service plan.

Shortly after Ashtyn Roe's birth, the Department petitioned the Chippewa Circuit Court, Family Division, to terminate Finfrock's parental rights to this child. In the petition, the Department alleged that Daniel Finfrock died from intracranial trauma that was later ruled a homicide. It further alleged that Finfrock and Perrault told tribal police and the FBI that they were the only caregivers for Daniel Finfrock on the day he was injured. The petition noted that the criminal investigation into Daniel Finfrock's death remained unresolved. The petition also alleged that Finfrock's parental rights to Aliyah Bertrand had been terminated in July 2005 and that Finfrock had failed to comply with the service plan put in place for her at that time. Finally, the petition alleged that Samuel Roe was convicted of attempted fourth-degree criminal sexual conduct with a 14-year-old in 1996 and that he and Finfrock still resided together. On the basis of these allegations, the Department asked the trial court to terminate Finfrock's parental rights to Ashtyn Roe under MCL 712A.19b(3)(i). At a December 2007 hearing, Finfrock admitted these allegations and agreed to the trial court's jurisdiction.

The trial court held a termination trial in January 2008. At the trial, Robyn Hill, who was the foster care worker assigned to Finfrock's case in 2005, testified that the tribal court had terminated Finfrock's parental rights to her older daughter, Aliyah Bertrand. Hill also testified about her work with Finfrock. Hill noted that Finfrock had a history of choosing relationships with

men that had histories of domestic violence. Hill expressed concern about Finfrock's new relationship with a man who had a criminal sexual conduct conviction.

David Babcock testified that he was a protective services worker for the Department. He stated that he was concerned about Finfrock's new relationship and by her recent conviction for furnishing alcohol to a minor. Babcock indicated that Daniel Finfrock's death was a serious concern because Finfrock may have had a direct role in his death or, at the very least, contributed to it through her relationship with a man that she knew was abusive. Babcock opined that Finfrock's newest relationship was another poor choice and reflected a continuing pattern of behavior that placed her children at risk. Babcock testified that Finfrock minimized the risks posed by her relationships. Babcock also expressed concern that, although she was able to reiterate the things that were taught to her in her parenting and substance abuse classes, Finfrock did not seem to be able to incorporate those concepts into her day-to-day living.

Lori Tomkinson, the foster worker assigned to this case, testified that Finfrock stated that she did not really know why her parental rights to her older daughter were terminated, but later admitted that she did not comply with the plan's requirement that she leave Perrault. Tomkinson stated that Finfrock also admitted that she left her handicapped son with a man who was abusive towards her.

Martha Snyder testified as an expert on Indian child law. She stated that Finfrock's conduct was definitely not within the parental norms of the tribal community. She testified that Finfrock appeared to put her own needs first and that she doubted that Finfrock could ever place her children's needs ahead of her own.

Snyder opined that, if returned to her mother, Ashtyn Roe would be in danger of serious emotional, physical, and mental harm. She also indicated that she believed that the Department had met the reasonable requirements to keep the family intact, given Finfrock's knowledge of or involvement in Daniel Finfrock's death.

In addition to this testimony, there was testimony that established that Finfrock had obtained some mental health services and had successfully participated in a drug court program. Indeed, Finfrock's therapist testified that Finfrock had been discharged from therapy and that she had begun to realize that she did not need another person to make her whole. Further, Finfrock's mother testified that Finfrock had changed her lifestyle and that she was not making the same choices that she used to make. She also stated that she knew Samuel Roe and that he did not exhibit the controlling and violent behavior that Perrault did. Finally, Finfrock herself testified about the changes she had made for herself. Finfrock stated that she had worked on the issues that had plagued her in the past and that she would now live her life in a good way.

In February 2008, the trial court issued its opinion from the bench. The trial court found that the provisions of MCL 712A.19b(3)(i) had been proved beyond a reasonable doubt, stating, "There had been a case service plan. There had been a death of one child, neglect of the other, and efforts to rehabilitate the [mother] were unsuccessful, resulting in termination . . . so that part of the statute has been complied with beyond a reasonable doubt." The trial court then turned to the ICWA's requirements. After summarizing the record evidence, the trial court concluded that "the evidence establishes beyond a reasonable doubt . . . that the custody of this child by the respondent mother is

likely to result in serious emotional or physical damage to the child." For this reason, the trial court terminated Finfrock's parental rights to Ashtyn Roe. Finfrock now appeals as of right.

II. THE ICWA

A. STANDARD OF REVIEW

Finfrock argues that the trial court erred when it terminated her parental rights to Ashtyn Roe without requiring the Department to prove beyond a reasonable doubt that it made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of her Indian family and that these efforts proved unsuccessful.[5] More specifically, Finfrock alleges three specific errors in this regard. First, she contends that the trial court failed to make specific findings regarding whether active efforts were made and had proven unsuccessful before it proceeded with the termination. Second, she argues that the efforts the Department provided as part of a prior termination case will not satisfy the requirements of § 1912(d) of the ICWA. Rather, she argues, the Department must provide new efforts for each case, which the Department did not do in this case. Third, she argues that the evidence the Department presented at trial was insufficient to prove beyond a reasonable doubt that the efforts the Department actually provided were unsuccessful. Each of these errors, Finfrock contends, warrants reversal of the trial court's decision to terminate her parental rights.

This Court reviews for clear error a trial court's decision terminating parental rights.[6] "A circuit court's

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[5] See 25 USC 1912(d).

[6] MCR 3.977(J); *In re Trejo Minors*, 462 Mich 341, 356-357; 612 NW2d 407 (2000).

decision to terminate parental rights is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."[7] However, this Court reviews de novo questions of law, such as the proper interpretation of the ICWA.[8]

B. THE ICWA REQUIREMENTS

Congress enacted the ICWA in response to evidence of abusive child welfare practices in the states that resulted in the separation of large numbers of Indian children from their families and tribes.[9] The ICWA does not entirely displace the application of state child custody laws to proceedings involving Indian children. But it does impose certain mandatory procedural and substantive safeguards.[10] Thus, although due process normally only requires that a state prove a ground for termination by clear and convincing evidence,[11] under the ICWA, "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[12] Additionally, under the ICWA:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under

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[7] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[8] *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005).

[9] 25 USC 1901; *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989).

[10] *Mississippi Band of Choctaw Indians*, *supra* at 36; *In re Elliott*, 218 Mich App 196, 201; 554 NW2d 32 (1996).

[11] *Santosky v Kramer*, 455 US 745, 747-748; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

[12] 25 USC 1912(f).

> State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[13]

It is undisputed that the provisions of the ICWA apply to this case involving an Indian parent and her child.[14]

C. THE TRIAL COURT'S FACTUAL FINDINGS ON ACTIVE EFFORTS

As stated, under the plain language of § 1912(d) of the ICWA, the Department had the burden of proving that "active efforts have been made" to prevent the breakup of Finfrock's family and "that these efforts have proved unsuccessful." Further, because the Department must "satisfy" the trial court that the active efforts were made and were unsuccessful in order "to effect" the termination, the trial court had to find specifically that the Department had made active efforts and that these efforts were unsuccessful before it could proceed with the termination of Finfrock's parental rights.[15]

Contrary to the contentions of the Department, the child's guardian ad litem, and the Sault Ste. Marie

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[13] 25 USC 1912(d) (emphasis added).

[14] See 25 USC 1903.

[15] *In re SD*, 236 Mich App 240, 244-245; 599 NW2d 772 (1999) (noting that active efforts are normally required before termination of parental rights, but concluding that § 1912[d] did not apply to the facts of the case because termination would not break up an Indian family). See also *In re Walter W*, 274 Neb 859, 862-863; 744 NW2d 55 (2008) (noting that, in addition to the state elements required to terminate parental rights, the ICWA imposes two additional elements: the active efforts element and the serious emotional or physical damage element); *In re JS*, 177 P3d 590, 591 (Okla Civ App, 2008) (noting that the active efforts requirement is a predicate finding that the trial court must make before a termination case may proceed).

Tribe of Chippewa Indians (the Tribe), the trial court did not make the findings required under § 1912(d) of the ICWA. The Department and the Tribe correctly note that the trial court mentioned that there "had been a case service plan" and that "efforts to rehabilitate the [mother] were unsuccessful." But the trial court did not make these statements as part of findings concerning the requirements of § 1912(d) of the ICWA. Rather, the trial court made these remarks in the context of its finding that the Department had proved the statutory grounds for termination under MCL 712A.19b(3)(i). Indeed, there is nothing in the trial court's opinion that even suggests that it was aware that it had to make findings under § 1912(d) of the ICWA. Manifestly, therefore, the trial court failed to make the requisite findings under § 1912(d) of the ICWA.

Because the trial court did not make the requisite findings under § 1912(d) of the ICWA, it lacked the authority to proceed with the termination of Finfrock's parental rights.[16] Therefore, we reverse the trial court's decision to terminate Finfrock's parental rights to Ashtyn Roe and remand this case to the trial court for the necessary factual findings under § 1912(d) of the ICWA.

Given our resolution of this issue, we decline to address Finfrock's contention that the trial court clearly erred when it found that her continued custody of Ashtyn Roe would likely result in serious emotional or physical damage. On remand, the trial court will again have the opportunity to consider the facts and make a finding concerning the likelihood of serious emotional or physical damage.[17] However, because the

[16] *In re SD*, *supra* at 244.

[17] See 25 USC 1912(f).

parties disagree about the nature of the findings required by § 1912(d) of the ICWA and the proper burden of proof, and because those disagreements are likely to reoccur on remand, we address the parties' remaining arguments on the proper application of § 1912(d) of the ICWA.

D. THE APPLICABLE STANDARD OF PROOF

The parties disagree about the standard of proof applicable to the trial court's findings under § 1912(d) of the ICWA. Finfrock contends that the requirements of § 1912(d) must be proven beyond a reasonable doubt. In contrast, the Tribe and the child's guardian ad litem contend that the Department's burden under § 1912(d) need only be proven by clear and convincing evidence and that this Court's previous applications of a beyond a reasonable doubt standard were incorrect.[18]

We note that this Court, in *In re Morgan*, simply adopted the beyond a reasonable doubt standard applied by the South Dakota Supreme Court in *In re SR* without actually analyzing whether that was the proper standard.[19] In that case, the South Dakota Supreme Court noted that Congress did not specify a standard of proof for determinations made under § 1912(d) of the ICWA.[20] Nevertheless, without engaging in any analysis, the court stated that it "assume[d] that the same burden required to prove serious emotional or physical harm under § 1912(f), beyond a reasonable doubt, would also be required to prove active efforts by the

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[18] See *In re Kreft*, 148 Mich App 682, 693; 384 NW2d 843 (1986); *In re Morgan*, 140 Mich App 594, 604; 364 NW2d 754 (1985).

[19] *In re Morgan*, *supra* at 604, citing *In re SR*, 323 NW2d 885 (SD, 1982).

[20] *In re SR*, *supra* at 887.

party seeking termination."[21] Other states, however, have rejected application of that standard.[22] For example, in *In re Walter W*, the Nebraska Supreme Court rejected application of a beyond a reasonable doubt standard to determinations under § 1912(d), explaining:

> Congress did not intend in 25 USC § 1912 to create a wholesale substitution of state juvenile proceedings for Indian children. Instead, in § 1912, Congress created additional elements that must be satisfied for some actions but did not require a uniform standard of proof for the separate elements. As discussed, Congress imposed a "beyond a reasonable doubt" standard for the "serious emotional [or] physical damage" element in parental rights termination cases under § 1912(f). Congress also imposed a "clear and convincing" standard of proof for the "serious emotional or physical damage" element in foster care placements under § 1912(e). The specified standards of proof in subsections § 1912(e) and (f) illustrate that if Congress had intended to impose a heightened standard of proof for the active efforts element in § 1912(d), it would have done so.[23]

Because Congress did not provide a heightened standard of proof for § 1912(d) of the ICWA, the Nebraska Supreme Court declined to read the beyond a reasonable doubt standard into the statute.[24] Instead, the court determined that the default standard of proof for all termination of parental rights cases applied.[25]

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[21] *Id*.

[22] See *In re Walter W*, *supra* at 864 n 9, 864-865 (listing jurisdictions that have rejected the beyond a reasonable doubt standard for determinations made under § 1912[d] and joining that group). See also *In re Michael G*, 63 Cal App 4th 700, 709-712; 74 Cal Rptr 2d 642 (1998) (rejecting the line of authorities that impose a heightened burden of proof on determinations under § 1912[d]).

[23] *In re Walter W*, *supra* at 864-865.

[24] *Id*. at 865.

[25] *Id*.

We agree with the Nebraska Supreme Court's analysis: Congress clearly demonstrated its ability to impose a particular standard of proof for the elements required under the ICWA. But Congress chose *not* to do so for the § 1912(d) "active efforts" determinations. Therefore, we conclude that this Court in *In re Morgan* and in *In re Kreft* incorrectly adopted a beyond a reasonable doubt standard of proof for these determinations. This Court issued both of these decisions before November 1, 1990, and there are no published decisions after that date applying the beyond a reasonable doubt standard to determinations under § 1912(d) of the ICWA. Therefore, we are not bound by precedent to apply this standard of proof.[26] We hold that the proper standard of proof for determinations under § 1912(d) of the ICWA is the default standard applicable to all Michigan cases involving the termination of parental rights. That standard is proof by clear and convincing evidence.[27]

E. THE "ACTIVE" EFFORTS REQUIREMENT

The parties also disagree about whether the active efforts must be part of a service plan offered in connection with *current* proceedings. We conclude that formal or informal services provided *before* the current proceeding may meet the "active efforts" requirement of § 1912(d) of the ICWA. Further, we conclude that, where there is clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d).

Subsection 1912(d) of the ICWA clearly places the burden on the party seeking termination to satisfy the trial court that active efforts to provide the required

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[26] MCR 7.215(J)(1).

[27] See *In re Trejo Minors*, *supra* at 356-357.

services have been made and that they were unsuccessful. But the statute does not provide guidance concerning the nature or extent of the active efforts necessary to satisfy the requirement or the timing within which those efforts must be made.[28] The statute merely requires proof that "active efforts have been made to provide remedial services or rehabilitative programs" to prevent the breakup of the Indian family at some point before termination and that the efforts "proved unsuccessful."[29] Hence, there is no precise formula for determining what constitutes sufficient "active efforts."

Our colleague in her thoughtful dissent concludes that the term "active efforts" "embodies a temporal component" and should be interpreted as requiring current, or contemporaneous, rehabilitation efforts.[30] We respectfully disagree. We acknowledge that the term "active" may be "characterized by current activity, participation, or use."[31] However, because a Michigan court has not yet interpreted the term "active efforts," we may look to other jurisdictions for guidance.[32] In keeping with the majority of jurisdictions that have previously addressed this issue, we hold that the Department need not show temporally concurrent "active" efforts with each proceeding under the ICWA.

Most notably, in *In re KD*, the Colorado Court of Appeals explicitly concluded that the " 'active efforts' required by § 1912(d) of the ICWA need not be part of a

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[28] See *In re Walter W*, *supra* at 865 (noting that the language "sets out praiseworthy but vague goals for the courts to enforce," which fail to give guidance "in determining whether the Department's efforts were sufficient to meet ICWA's mandates").

[29] 25 USC 1912(d).

[30] *Post* at 122.

[31] *Random House Webster's College Dictionary* (1997) (citing as examples, "active member" and "active account").

[32] *People v Rogers*, 438 Mich 602, 609; 475 NW2d 717 (1991).

treatment plan offered as part of the current dependency proceedings."[33] Accordingly, the court held that, because of the extensive, but unsuccessful, services that the social services department provided to the father during two previous dependency cases, it would be an " 'exercise in futility' " to offer another treatment plan.[34]

Several other jurisdictions have also held that, although § 1912(d) of the ICWA requires "active efforts," it does not require a social services department to " 'persist with futile efforts.' "[35] For example, in *EA v Div of Family & Youth Services*, the Alaska Supreme Court held that where parental rights have already been terminated with respect to one or more children, the court "may consider the degree of the state's efforts to prevent the breakup of the entire family in assessing whether that effort was sufficient under ICWA."[36] The court noted that the Division of Family and Youth Services (DFYS) had "expended substantial efforts over the last decade to prevent the breakup of [the] family, without success."[37] The court further stated that, therefore, "[t]here [was] no reason to think that either an

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[33] *In re KD*, 155 P3d 634, 637 (Colo App, 2007).

[34] *Id*. (stating that "the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination of parental rights").

[35] *Id*., quoting *In re JSB*, 691 NW2d 611, 621 (SD, 2005), and citing *In re PB*, 371 NW2d 366, 372 (SD, 1985) (stating that a social services department is not charged with "the duty of persisting in efforts that can only be destined for failure"). See also *In re Nicole B*, 175 Md App 450, 472; 927 A2d 1194 (2007) ("[T]he requirement of 'active efforts' does not require 'futile efforts.' ").

[36] *EA v Div of Family & Youth Services*, 46 P3d 986, 991 (Alas, 2002).

[37] *Id*.

additional psychological evaluation or an additional seven months of intervention would have prevented" the termination.[38]

Similarly, in *Letitia V v Superior Court of Orange Co*, the California Court of Appeals addressed "whether 'active efforts' within the meaning of ICWA require reunification services be provided for each individual child or, put another way, whether the state is free to consider what it defines as recent but unsuccessful reunification efforts with the same parent but a different child sufficient to satisfy the mandate of [25 USC 1912(d)] with regard to a sibling."[39] Stating that "[t]he law does not require the performance of idle acts," and noting the drain on resources that the provision of further services would put on an already strained dependency system, the court held that additional services were not necessary where the service provider had already spent years providing unsuccessful services that did not benefit the parent.[40]

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[38] *Id*., citing *NA v Div of Family & Youth Services*, 19 P3d 597, 603-604 (Alas, 2001) (stating that there is no reason to think that the DFYS's failure to enroll the parent in yet another residential dual-treatment program would have resulted in a more successful outcome), and *KN v Alaska*, 856 P2d 468, 477 (Alas, 1993) (noting that "[a]lthough . . . DFYS might have done more, it is unlikely that further efforts by DFYS would have been effective in light of [the parent's] attitude").

[39] *Letitia V v Superior Court of Orange Co*, 81 Cal App 4th 1009, 1016; 97 Cal Rptr 2d 303 (2000).

[40] *Id*., citing *AA v Div of Family & Youth Services*, 982 P2d 256, 262 (Alas, 1999) (additional services not required where parent demonstrates "lack of commitment to treatment"); *AM v Alaska*, 945 P2d 296, 305 (Alas, 1997) (in determining sufficiency of remedial efforts, court may consider a parent's demonstrated lack of willingness to participate in treatment); *In re Annette P*, 589 A2d 924, 928-929 (Me, 1991) (finding prior remedial efforts sufficient where parents failed to cooperate with case worker or demonstrate interest in reunification); *In re ARP*, 519 NW2d 56, 60-62 (SD, 1994) (finding that the efforts made in siblings' cases were sufficient to justify the termination of parental rights without the provision of additional remedial services); *In re SR*, *supra* at 887

In keeping with these jurisdictions, we conclude that the ICWA does not require *current* active efforts " 'if it is clear that past efforts have met with no success.' "[41] Thus, where a parent has consistently demonstrated an inability to benefit from the Department's provision of remedial and rehabilitative services, or has otherwise clearly indicated that he or she will not cooperate with the provision of the services,[42] a trial court's finding that additional attempts to provide services would be futile will satisfy the requirements of § 1912(d) of the ICWA. Nothing in § 1912(d) precludes the Department from seeking termination of parental rights where active efforts to reunite the family have proven unsuccessful in the past.[43] " 'A child should not be required to wait for parents to acquire parenting skills that may never develop.' "[44]

Thus, we conclude that nothing within § 1912(d) of the ICWA requires the Department to provide duplica-

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(finding active efforts within the meaning of the ICWA after repeated but unsuccessful steps were taken to encourage the mother to take advantage of available treatment programs); *CEH v LMW*, 837 SW2d 947, 957 (Mo App, 1992) (additional remedial programs not required where prior "efforts became futile and proved unsuccessful"); *State ex rel Juvenile Dep't of Multnomah Co v Woodruff*, 108 Or App 352, 357; 816 P2d 623 (1991) (additional services not required by ICWA where parents with long history of alcohol and drug abuse had received prior services).

[41] *In re KD*, *supra* at 637, quoting *In re Adoption of Hannah S*, 142 Cal App 4th 988, 998; 48 Cal Rptr 3d 605 (2006).

[42] See *Wilson W v Office of Children's Services*, 185 P3d 94, 101-103 (Alas, 2008) (holding that the Office of Children's Services was not required to keep trying to provide services to a violent and uncooperative parent once it became clear that the attempts would be futile).

[43] See *In re Romano*, unpublished opinion per curiam of the Court of Appeals, issued December 11, 1998 (Docket No. 207482). Although nonbinding, we find this statement from this unpublished opinion persuasive. MCR 7.215(C)(1); *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003).

[44] *In re ARP*, *supra* at 62 (quotation marks and citation omitted).

tive remedial or rehabilitative services.[45] Subsection 1912(d) does not specify the time within which the active efforts must have been made. Rather, it only requires that the trial court be satisfied that the Department, in fact, made such active efforts before the trial court may proceed. Construed in context, § 1912(d) only requires "that timely and affirmative steps be taken to accomplish the goal which Congress has set: to avoid the breakup of Indian families whenever possible by providing services designed to remedy the problems which might lead to severance of the parent-child relationship."[46] For these reasons, the fact that the Department provided particular services in connection with a *prior* proceeding does not necessarily preclude such services from meeting the "active efforts" requirement in a *current* proceeding. Rather, the Department "may engage in 'active efforts' by providing formal or informal efforts to remedy a parent's deficiencies before dependency proceedings begin."[47] Whether the prior services were timely and sufficient will depend on the facts specific to the case.[48]

Accordingly, we decline to employ a definition of "active" that stresses a temporal requirement. In the context of the ICWA, we read the term "active" as being "marked by or disposed to direct involvement or practical action."[49] In other words, we read the "active efforts" requirement as imposing an obligation on the Department to take an involved, rather than a passive, approach when providing remedial services and reha-

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[45] See *Letitia V*, *supra* at 1016.

[46] *Id*.

[47] *In re KD*, *supra* at 637.

[48] *Wilson W*, *supra* at 101; *In re Walter W*, *supra* at 865.

[49] *Random House Webster's College Dictionary*, p 13 (citing as example, "active support").

bilitative programs to an Indian family. We note that in *AA v Div of Family & Youth Services* the Alaska Supreme Court specifically adopted this active versus passive interpretation, stating:

> Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.[50]

Similarly, in *In re JS*, the Oklahoma Court of Civil Appeals explained as follows:

> Used in § 1912(d) as an adjective modifying "effort," the common and ordinary meaning of "active" means "characterized by action rather than contemplation or speculation" or "participating," *Webster Third New International Dictionary* 22 (1986), and "causing action or change," "effective," or "active efforts for improvement," *The American Heritage Dictionary* 7 (1986). As the Alaska Supreme Court in *A.A. v. State of Alaska* recognized, the opposite or antonym of "active" is "passive." *See The New Webster Encyclopedic Dictionary of the English Language* (1980).[51]

Stated another way, "active efforts" requires more than simply pointing the parent in the right direction, it "requires 'leading the horse to water.' "[52]

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[50] *AA*, *supra* at 261 (quotation marks and citation omitted). See also *In re AN*, 325 Mont 379, 384; 106 P3d 556 (2005) ("The term active efforts, by definition, implies heightened responsibility compared to passive efforts. Giving the parent a treatment plan and waiting for him to complete it would constitute passive efforts.").

[51] *In re JS*, *supra* at 593.

[52] *Id*. at 594.

We further note that the majority of jurisdictions interpret "active efforts" as imposing a higher burden than various states' "reasonable efforts" requirement,[53] and that numerous courts have required that the service provider "provide *culturally relevant* remedial and rehabilitative services to prevent the breakup of the family."[54]

In sum, on remand, the trial court must determine whether there was clear and convincing evidence that the Department met its burden under § 1912(d) of the ICWA. In doing so, the trial court should consider the adequacy of the past provisions of remedial services to Finfrock, taking into account the extent of the Department's efforts and their cultural relevance. The trial court may also consider evidence that the provision of additional services to Finfrock would be futile.

III. CONCLUSION

Because the trial court failed to make the factual findings required by 25 USC 1912(d), it could not

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[53] *In re Nicole B*, *supra* at 471 ("The majority of courts that have considered the 'active efforts' requirement . . . have determined that it sets a higher standard for social services departments than the 'reasonable efforts' required by state statutes."). See also *Winston J v Dep't of Health & Social Services*, 134 P3d 343, 347 n 18 (Alas, 2006); *MW v Dep't of Health & Social Services*, 20 P3d 1141, 1146 n 18 (Alas, 2001); *In re Walter W*, *supra* at 865; *In re JS*, *supra* at 593.

[54] *Carson P ex rel Foreman v Heineman*, 240 FRD 456, 474, 500 (D Neb, 2006) (emphasis added). See also *In re Walter W*, *supra* at 865 ("[A]t least some efforts should be 'culturally relevant.' "); *In re Michael G*, *supra* at 714 (stating that "the court should take into account "the prevailing social and cultural conditions and way of life of the Indian child's tribe," and that remedial services should "involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers") (quotation marks and citation omitted); *In re Welfare of Children of SW*, 727 NW2d 144, 150 (Minn App, 2007) (stating that "active efforts" are "thorough, careful, and culturally appropriate efforts") (quotation marks and citation omitted).

proceed to terminate Finfrock's parental rights to Ashtyn Roe. Consequently, we reverse the trial court's decision, vacate the termination order of February 1, 2008, and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MARKEY, P.J., concurred.

GLEICHER, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that the clear and convincing evidence standard governs whether "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 USC 1912(d). I also agree that the circuit court failed to make the required finding that petitioner made "active efforts" that proved unsuccessful. I respectfully disagree, however, with the majority's determination that previous rehabilitative efforts, involving other children and entirely different circumstances, may meet the requirements of §1912(d) of the Indian Child Welfare Act (ICWA), 25 USC 1901 through 1963. Further, I disagree with the majority's conclusion that the circuit court may altogether avoid applying § 1912(d) by simply deciding that additional services would be "futile."

I. FACTUAL BACKGROUND

Respondent's first child, Daniel Finfrock, died on January 8, 2005. The medical examiner concluded that Daniel had sustained intracranial trauma, and ruled his death a homicide. When Daniel's injury occurred, respondent and Steven Perrault, her then-boyfriend, were

Daniel's sole caregivers. Neither the United States nor the state of Michigan filed criminal charges against Perrault or respondent.[1] Respondent continued to cohabit with Perrault after Daniel's death, despite her belief that Perrault had harmed the child. Respondent later acknowledged her awareness that Perrault's presence created a risk of harm for Aliyah, respondent's two-year-old daughter. On January 10, 2005, petitioner filed a petition seeking circuit court jurisdiction over Aliyah. The tribal court of the Sault Ste. Marie Tribe of Chippewa Indians eventually assumed jurisdiction of the proceedings.[2]

Respondent received services coordinated by the Binogii Placement Agency, which supplies adoption and foster care services to the Sault Ste. Marie Chippewa Tribe. According to Robyn Hill, a Binogii foster care worker, respondent reported that Perrault had abused her emotionally, physically, and sexually, and had confessed to having "hurt Daniel." Respondent also described domestic violence committed by her estranged husband, Jose Bertrand. Hill referred respondent for domestic violence counseling and parenting classes. Hill reported that respondent participated in the recommended services, but failed to terminate her relationship with Perrault. In April 2005, the tribe filed a petition in the tribal court seeking the termination of respondent's parental rights to Aliyah, and all services ceased. Only then did respondent move into a domestic violence shelter. She never reestablished her relationship with Perrault.

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[1] Because Perrault and respondent lived on reservation land, the Federal Bureau of Investigation investigated Daniel's death.

[2] According to MCR 3.980(A)(3), "[i]f the tribe exercises its right to appear in the proceeding and requests that the proceeding be transferred to tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer . . . or the court finds good cause not to transfer."

In June 2005, respondent independently sought counseling through the Sault Tribe's behavioral health program, and also commenced employment with a local casino. In July 2005, the tribe terminated respondent's parental rights to Aliyah. Respondent continued counseling with William Lane Barber, a mental health therapist employed by the Tribe, until July 28, 2006. In September 2006, after being charged with furnishing alcohol to a minor, respondent entered a drug court diversion program, which she successfully completed.

In December 2006, respondent began an intimate relationship with Samuel Roe, a casino coworker, and conceived Ashtyn in February 2007. Respondent lost her job at the casino because of pregnancy-related complications. She delivered Ashtyn on October 26, 2007. That same day, petitioner filed a petition in the circuit court seeking circuit court jurisdiction over the infant. An amended petition filed two weeks later described Daniel's death and the previous termination of respondent's parental rights to Aliyah. The petition alleged that Roe "was convicted of attempted 4th degree criminal sexual conduct with a 14 yr old in 1996. He remains a registered sex offender." According to the petition, respondent and Roe had purchased a house, and Roe "told petitioner that he intends to remain with" respondent.

On December 14, 2007, respondent admitted the allegations made in an amended petition, and the circuit court assumed jurisdiction over Ashtyn. The amended petition sought termination of respondent's parental rights to Ashtyn pursuant to MCL 712A.19b(3)(i), which permits a court to terminate parental rights if it finds by clear and convincing evidence that "[p]arental rights to 1 or more siblings of the child have been terminated due to serious and

chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful."

After respondent entered her plea, the court heard testimony regarding visitation and "reasonable efforts" to reunite the family. Martha Snyder, a "qualified Indian expert," recommended that the court permit Roe supervised visitation, and that petitioner offer him a service plan. But Snyder opposed allowing respondent any visitation, and admitted that no efforts had been made "to maintain the child in the home." Snyder conceded that the ICWA required "reasonable efforts," although she expressed, "I don't know what would be reasonable efforts in this case."[3] The circuit court opined:

> Alright, then the Court's satisfied, under MCR 3.978(C) that, based upon the evidence here, that I'm satisfied by clear and convincing evidence, including the testimony of Ms. Snyder, that services have been provided in the past and that they failed to be successful as admitted to here in the petition today. And so the Court's satisfied that services were provided to prevent the break-up and removal of the child, and so the Court's going to continue the child out of home under jurisdiction of the Court.

The circuit court commenced a termination hearing on January 15, 2008. As recounted by the majority, Hill, Snyder, David Babcock, and Lori Tomkinson testified in support of terminating respondent's rights to Ashtyn.

Hill explained that she became Aliyah's foster care worker in January 2005, while respondent and Aliyah were under tribal court jurisdiction. Hill described the services offered to respondent during those four months in 2005 as follows: "I did make referrals for domestic

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[3] As discussed in more detail, later, the ICWA actually requires "active efforts," not "reasonable efforts."

violence through the . . . Sault Tribe [sic]. She was offered parenting." Hill provided the court with no further description of the services offered to respondent, and admitted that she had no contact with respondent after April 2005. According to Hill, respondent "did participate" in the services, but Hill did not further elaborate. Hill identified as her current "biggest concern" "that this child would experience and witness some of the same things that have happened to the other two children historically." Hill conceded that she knew "nothing" about the "actual home life" of respondent and Roe, lacked any knowledge regarding Roe besides the fact that he had a previous conviction, knew of no reason that Roe would harm Ashtyn, and could only speculate "as to what may or may not happen in the future" based on respondent's past relationships with Perrault and Bertrand.

Snyder opined that respondent's relationship history did not meet the tribe's "parenting norms." When questioned regarding "reasonable efforts to keep this family intact," Snyder testified, "I think there have been many prior reasonable efforts with [respondent], and given this circumstance of her still being only one of two people that could have killed Danny, I mean, at the very best, she has to know, so with [respondent], I'm definite, you know on termination." Snyder did not additionally detail any of the "prior reasonable efforts" given respondent.

Babcock, a Department of Human Services (DHS) worker, admitted that he had never personally worked with respondent. Babcock nonetheless believed that respondent's parental rights to Ashtyn should be terminated because she had a recent conviction of furnishing alcohol to a minor, had become involved with Roe, a convicted sex offender, and failed to promptly extricate

herself from her relationship with Perrault, despite her awareness that he was violent and abusive toward her and her children. Babcock lacked awareness of any counseling that respondent received after the termination involving Aliyah. Despite Roe's prior conviction of attempted criminal sexual conduct, Babcock approved that petitioner intended to offer Roe services, and Babcock "specifically did not request termination" of Roe's parental rights.

Tomkinson, another DHS worker, testified that she interviewed respondent and Roe. Tomkinson recalled that respondent referred to Roe as her fiancé and identified the relationship as "a dream relationship." Respondent told Tomkinson that she "wanted to get back in Tribal Social Services for counseling" with Roe. Tomkinson recommended termination of respondent's rights on the basis of "[t]he prior termination of parental rights in the tribal court, the unresolved homicide of Daniel, and the risk of harm to Ashtyn if placed with her mother." Tomkinson further recommended that the circuit court order Roe to separate from respondent.

Barber, respondent's mental health therapist, testified that during their initial sessions, respondent demonstrated "a lot of shame and guilt, a lot of blame. She blamed herself for getting involved in relationships that were harmful. She blamed herself for being involved with Mr. Perrault." When Barber discharged her from therapy in 2006, respondent "was living by herself. She was holding a job. She was making her own money, not being dependent on someone else to pay bills for her, to make decisions for her." Barber characterized respondent's prognosis as "excellent."

Patrick McKelvie, a caseworker for the tribe's community and family services agency, testified that respondent entered the drug court program sometime in

September 2006, when he served as the coordinator of that program. According to McKelvie, respondent "was a model participant," who "did everything that was expected of her. She completed her GED [general equivalency diploma] in record time. She never tested dirty. She kept all of her appointments. She never tried to renegotiate the terms of the program."

Respondent and her mother testified that respondent continued to have supervised visits with Aliyah, even though her parental rights to the child were terminated.

In its bench opinion, the circuit court reviewed the evidence and concluded that petitioner had proven the statutory ground contained in MCL 712A.19b(3)(i) "beyond a reasonable doubt." The circuit court reasoned, "There had been a case service plan. There had been a death of one child, neglect of the other, and efforts to rehabilitate the [respondent] were unsuccessful, resulting in termination . . . so that part of the statute has been complied with beyond a reasonable doubt." As required by the ICWA,[4] the circuit court made a separate finding, that "the evidence establishes beyond a reasonable doubt . . . that the custody of this child by respondent mother is likely to result in serious emotional or physical damage to the child."

II. THE ICWA'S "ACTIVE EFFORTS" REQUIREMENT

The majority acknowledges that "under the plain language of [25 USC 1912(d)], the Department had the

[4] Pursuant to 25 USC 1912(f):

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

burden of proving that 'active efforts have been made' to prevent the breakup of [respondent's] family and 'that these efforts have proved unsuccessful.' " *Ante* at 97. The majority qualifies this indisputably accurate statement with the observation that "formal or informal services provided *before* the current proceeding may meet the 'active efforts' requirement of § 1912(d) . . . ." (Emphasis in original). *Ante* at 101. The majority further opines that "where there is clear and convincing evidence that the provision of additional services would be futile, that finding can meet the requirements of § 1912(d)." *Ante* at 101.

I respectfully disagree with both qualifications. In my view, previously provided services likely cannot satisfy the "active efforts" requirement, and a court may not presume, solely on the basis of prior services, that current services "would be futile."

A. THE MEANING OF "ACTIVE EFFORTS"

In *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989), the United States Supreme Court explained that the ICWA

> was the product of rising concerns in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.

The Supreme Court further observed that Congressional findings "incorporated into the ICWA" included:

> "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ;

> "(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> "(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." [*Id*. at 35-36, quoting 25 USC 1901.]

The ICWA contains "[v]arious . . . provisions" that "set procedural and substantive standards" for state court child custody proceedings involving Indian children. *Mississippi Band of Choctaw Indians*, *supra* at 36. The ICWA's "active efforts" standard provides:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [25 USC 1912(d).]

In contrast to the ICWA's mandate that a party seeking termination of parental rights satisfy the court that "active efforts" have been made to provide remedial services and rehabilitative programs, Michigan law permits a petitioner to withhold services if a parent "has had rights to the child's siblings involuntarily terminated." MCL 712A.19a(2)(c). Here, petitioner refused to offer any services to respondent because it filed a petition invoking only MCL 712A.19b(3)(i) as a ground for termination of respondent's parental rights. Subsection i contemplates as follows: "Parental rights

to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and *prior attempts to rehabilitate the parents have been unsuccessful*." (Emphasis supplied.)

B. RESOLUTION OF ANY CONFLICT BETWEEN THE ICWA AND MICHIGAN LAW

In *Mississippi Band of Choctaw Indians*, the United States Supreme Court examined the meaning of the word "domicile," used in the ICWA's § 1911(a), 25 USC 1911(a), to establish jurisdiction for tribal courts. The Supreme Court considered whether Congress intended the definition of "domicile" to be determined under state or federal law. *Id*. at 43. Invoking congressional purpose, the *Mississippi Band of Choctaw Indians* majority emphasized that "Congress intended a uniform federal law of domicile for the ICWA." *Id*. at 47. The Supreme Court imbued "content" into the term "start[ing] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," considering the " 'object and policy' " of the statute. *Id*.

Mississippi Band of Choctaw Indians requires that in this case we interpret the phrase "active efforts" using the ordinary meaning of the words, considering the "object and policy" of the ICWA. The ICWA embodies Congress's intent "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." 25 USC 1902. In *People ex rel JSB, Jr*, 691 NW2d 611, 616 (SD, 2005), the South Dakota Supreme Court examined in detail the "object and policy" of the ICWA's "active efforts" provision and the interplay between the "active efforts" provision of the ICWA and a state law permitting termination of parental rights when "reasonable ef-

forts" at reunification had failed. *Id*. at 618. In South Dakota, as well as in Michigan, a court may terminate parental rights without providing any services if the involved parent subjected the child to aggravated circumstances, including abandonment or sexual abuse, or has had his rights to other children terminated on the grounds of abuse or neglect. *Id*. The South Dakota Supreme Court held that the state law provision excusing a petitioner from making "reasonable efforts" to unify a family did not override the ICWA's obligation that "active efforts" be made to reunite JSB with his father. *Id*. The South Dakota Supreme Court also rejected that Congress's enactment of the Adoption and Safe Families Act (ASFA), 42 USC 671, which contemplates suspension of a state's duty to undertake "reasonable efforts" toward reunification in certain aggravated circumstances,[5] diminished the state's burden to

[5] The relevant portion of the ASFA provides as follows:

> (a) Requisite features of State plan.
>
> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> * * *
>
> (15) provides that—
>
> (A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;
>
> (B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—
>
> (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and

supply "active efforts" in all cases governed by the

(ii) to make it possible for a child to safely return to the child's home;

(C) if continuation of reasonable efforts of the type described in subparagraph (B) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan (including, if appropriate, through an interstate placement), and to complete whatever steps are necessary to finalize the permanent placement of the child;

(D) reasonable efforts of the type described in subparagraph (B) shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that—

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has—

(I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;

(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily;

(E) if reasonable efforts of the type described in subparagraph (B) are not made with respect to a child as a result of a determination made by a court of competent jurisdiction in accordance with subparagraph (D)—

ICWA. *Id*. at 619-620. The reasoning in *JSB* has been adopted by a number of other state courts.[6]

Here, the record evidence reveals that when petitioner filed the initial permanent custody petition, it entirely refused to provide respondent with services intended to preserve her familial relationship with Ashtyn, or to improve her ability to function as a parent. In my view, Congress's use of the term "active efforts" signals its intent that petitioner clearly and convincingly demonstrate the provision of *current* rehabilitative efforts designed to reunite an Indian parent with the particular child that is the target of the termination proceedings. Past efforts, involving other children and completely different circumstances, do not satisfy the object and policy of the ICWA, and do not qualify as "active efforts."

The term "active" is defined as "characterized by action rather than contemplation or speculation," or

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> (i) a permanency hearing . . . , which considers in-State and out-of-State permanent placement options for the child, shall be held for the child within 30 days after the determination; and
>
> (ii) reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child; and
>
> (F) reasonable efforts to place a child for adoption or with a legal guardian, including identifying appropriate in-State and out-of-State placements may be made concurrently with reasonable efforts of the type described in subparagraph (B) . . . . [42 USC 671.]

[6] *In re Welfare of Children of SW*, 727 NW2d 144, 150 (Minn App, 2007); *Winston J v Dep't of Health & Social Services, Office of Children's Services*, 134 P3d 343, 347 n 18 (Alas, 2006); *In re Interest of Dakota L*, 14 Neb App 559, 573-575; 712 NW2d 583 (2006); *In re AN*, 325 Mont 379, 384-385; 106 P3d 556 (2005).

"marked by present operation, transaction, movement or use." *Merriam-Webster Online Dictionary*, "active" <http://www.merriam-webster.com/dictionary/active> (accessed August 12, 2008). In *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990), this Court examined the statutory phrase "active employment," and concluded:

> Placing the "active" before employment must have been for the purpose of adding some further meaning—distinguishing between employees who were actually engaged in performing work for an employer at the time of retirement and those who were not. It follows, therefore, that "active employment" means one who is actively on the job and performing the customary work of his job, as opposed to one who terminates inactive employment.[7]

The phrase "active efforts" inherently embodies a temporal component, particularly in the context of the ICWA's motivating principles. The meaning of "active efforts" becomes clear by reference to the "object and policy" of the ICWA, which requires that a state prove *beyond a reasonable doubt* that "the *continued* custody" of the Indian child by the parent "*is* likely to result in serious emotional or physical damage to the child." 25 USC 1912(f) (emphasis supplied).[8] Standing alone, evidence of a parent's response to efforts provided years before, under altogether different conditions and with respect to other children, does not supply proof beyond a reasonable doubt regarding an Indian parent's cur-

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[7] According to Black's Law Dictionary (8th ed), p 228, an "active case" is "[a] case that is still pending." In *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 250-251; 704 NW2d 117 (2005), this Court interpreted "active employees . . . of the County" to mean present or current county employees.

[8] Our Supreme Court relied heavily on the tense used when it interpreted MCL 600.2912a(2) in *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60-61; 631 NW2d 686 (2001).

rent ability to safely manage "the continued custody" of a child. Indeed, this Court has recognized that "[s]ince a parent's fitness is not a static concept, much can happen in six months to reflect on that fitness." *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973).[9]

The majority cites several cases from other jurisdictions in support of its conclusion that a finding that further active efforts would be "futile" may satisfy the ICWA's requirement. However, those cases are readily distinguishable from the instant case. For example, in *Letitia V v Superior Court of Orange Co*, 81 Cal App 4th 1009, 1016; 97 Cal Rptr 2d 303 (2000), the mother had a long history of substance abuse, and the child "entered the world—and the juvenile dependency system—under the influence of cocaine." *Id*. at 1011. The court's description of the unsuccessful services provided to the mother over the course of six years before the child's birth consumes almost four pages of the opinion. Despite the mother's dreadful record of noncompliance, the petitioner attempted to provide her with more services after the birth of the child, including a referral to a drug recovery program. *Id*. at 1014-1015. In contrast to this case, the mother in *Letitia V* actually received some current services, but clearly demonstrated that she lacked any genuine interest in reforming her drug habit.

Similarly, the Indian father in *People ex rel KD*, 155 P3d 634, 636 (Colo App, 2007), received years of services during two previous dependency proceedings directed toward rehabilitating his relationship with the child. When the third dependency proceeding com-

[9] Notably, in *LaFlure*, this Court remanded for a new hearing de novo regarding the respondent's fitness, and ordered that her "fitness to have custody of Gary is to be determined *as of the date the circuit court considers this case on remand*." *Id*. at 392 (emphasis supplied).

menced involving the same child, the petitioner asserted that the father "suffered from an emotional illness" and, therefore, "no appropriate treatment plan could be devised." *Id*. The Colorado Court of Appeals held that "the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe that additional treatment would prevent the termination of parental rights." *Id*. at 637. In a subsequent ICWA case discussing *People ex rel KD*, the Colorado Court of Appeals explained that because of the father's emotional illness, "no treatment plan could address his parental unfitness." *In re NB*, 199 P3d 16, 24; 2007 WL 2493906, *9 (Colo App, 2007). Nevertheless, in marked contrast to the instant case, the father in *KD* received services for years, including treatment provided shortly before the child's final removal from the home.

Here, petitioner produced absolutely no evidence that respondent received "active efforts . . . to prevent the breakup of [her] Indian family." Snyder, the qualified Indian expert, admitted that no efforts had been made to maintain Ashtyn in respondent's home. Hill conceded that because she lacked any knowledge of respondent's current home situation, she could only speculate regarding respondent's fitness to parent Ashtyn. When petitioner removed Ashtyn from respondent and Roe, it unquestionably split apart their Indian family. It did so without providing *active* efforts to *that* family, as required by the ICWA. The ICWA's stated policy that Indian families be preserved whenever possible reinforces my conclusion that clear and convincing proof of "active efforts" requires more than a passing reference to a brief period of services provided three

years earlier, under vastly different circumstances. Further, without familiarizing itself with respondent's current situation, petitioner could not begin to determine whether services would potentially benefit respondent.

The majority decides that

> where a parent has consistently demonstrated an inability to benefit from the Department's provision of remedial and rehabilitative services, or has otherwise clearly indicated that he or she will not cooperate with the provision of the services, a trial court's finding that additional attempts to provide services would be futile will satisfy the requirements of § 1912(d) of the ICWA. Nothing in § 1912(d) precludes the Department from seeking termination of parental rights where active efforts to reunite the family have proven unsuccessful in the past. [*Ante* at 105.]

I cannot reconcile this dictum with the majority's definition of "active efforts," or the purposes of the ICWA. Here, "the family" subject to reunification bears virtually no relation to "the family" involved in respondent's prior termination. Previous active efforts to reunite respondent with Aliyah unlikely implicated the parenting issues relevant today, given that Perreault is out of the picture and no record evidence exists that Roe currently qualifies as physically or emotionally abusive. Further, the prior termination occurred pursuant to tribal law, and the tribe rather than the Department provided services. Because the Department never provided "remedial and rehabilitative services," respondent cannot possibly have "consistently demonstrated an inability to benefit" from them.

Additionally, the record evidence does not reflect whether respondent ever received "active efforts" consistent with "leading her to water," rather than passive efforts such as the "offers" and "referrals" described by Hill. The record also is silent regarding whether the

previous services had "cultural relevance." On remand, an in-depth analysis of these questions will not serve to answer beyond a reasonable doubt the only significant question now facing the circuit court: will continued custody of Ashtyn by respondent likely result in serious emotional or physical injury to Ashtyn? Without a meaningful examination of *present* circumstances, and the success or failure of *current* "active efforts" directly relevant to those circumstances, a circuit court is simply unprepared to determine that further efforts will "clearly and convincingly" qualify as "futile."

In my view, terminating an Indian parent's rights without providing any "active efforts" relevant to the parent's current situation robs the ICWA of meaning. Congress intended the ICWA to preserve Indian families, because intact Indian families represent a "resource . . . vital to the continued existence and integrity of Indian tribes." 25 USC 1901. The elevated standard of proof required by the ICWA and its insistence that "active efforts" must precede termination signal that termination of an Indian parent's rights is intended to be a procedurally painstaking process. Assumptions, presumptions, and evidentiary shortcuts have no place here. Therefore, I would reverse the circuit court's termination of respondent's parental rights, for the single reason that petitioner failed to clearly and convincingly demonstrate that it provided the active efforts required by federal law.

C. THE EVIDENCE ESTABLISHED RESPONDENT BENEFITED FROM PRIOR SERVICES

By the time that respondent conceived Ashtyn in February 2007, she had (1) permanently ended her relationship with Perrault; (2) completed her GED; (3) obtained employment; (4) purchased a home jointly

with Roe; (5) successfully completed a drug court program; and (6) engaged in uneventful visits with Aliyah. This evidence unequivocally demonstrates that respondent derived substantial benefit from previous services. Although belatedly, respondent removed herself from an exploitative relationship in which she had been entirely dependent on her abuser, and entered into an apparently positive relationship with a gainfully employed man. The record reveals that respondent's situation in November 2007 bore no resemblance at all to her circumstances at the time of Daniel's death. For these reasons, the majority's remand invitation that the circuit court may invoke futility to again terminate respondent's parental rights lacks any factual basis. The existing record simply does not contain clear and convincing evidence that the provision of additional services would be futile.

At the termination hearing, several of petitioner's witnesses asserted that respondent had inappropriately become involved with Roe because he was "a convicted sex offender." In my view, this criticism qualifies as pure pretext. Babcock admitted that despite Roe's conviction, Roe would receive services intended to preserve his parental rights to Ashtyn. If petitioner viewed Roe as a potentially fit and suitable father, I can discern no basis for a conclusion that his conviction automatically rendered respondent an unfit mother, simply on the basis of her involvement with Roe.

The record evidence demonstrates that the circuit court terminated respondent's parental rights primarily in punishment for Daniel's death. Snyder made no effort to conceal that Daniel's death motivated her recommendation for termination: "[G]iven this circumstance of her still being only one of two people that could have killed Danny, I mean, at the very best, she

has to know, so with [respondent], I'm definite, you know, on termination." Respondent was never formally charged with killing Daniel, or with being an accessory to his homicide. Nevertheless, the circuit court concluded that respondent's unproven role in Daniel's death, and her conduct during the four months thereafter, supplied proof beyond a reasonable doubt that respondent's custody of Ashtyn "would likely result in emotional or physical damage to the child." 25 USC 1912(f). In my view, petitioner could not possibly prove a likelihood of harm to Ashtyn *beyond a reasonable doubt* in the absence of any current information. See *In re Matthew Z*, 80 Cal App 4th 545, 552; 95 Cal Rptr 2d 343 (2000), in which the California Court of Appeals explained:

> [B]ased on the family-protective policies underlying the ICWA, it is reasonable to assume the ICWA section 1912(f) finding must be made at, or within a reasonable time before, the termination decision is made. Otherwise, it would be possible for a state to terminate parental rights when the current circumstances do not show a return to the parent's custody would be detrimental to the child's well-being. This would violate the words and spirit of the ICWA.

At its core, this case involves whether a court may conclude that a parent qualifies as presently unfit solely on the basis of the parent's past misconduct, uninformed by her current circumstances. I believe that the ICWA's "beyond a reasonable doubt" standard of proof precludes a presumption of unfitness predicated solely on past conduct. Rather, a court must engage in a meaningful examination of *present* circumstances to determine whether "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f).

"The stringency of the 'beyond a reasonable doubt' standard bespeaks the weight and gravity of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impos[e] almost the entire risk of error upon itself." *Santosky v Kramer*, 455 US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982) (quotation marks and citation omitted). In the criminal law, application of the "beyond a reasonable doubt" standard requires a fact finder to "reach a subjective state of near certitude of the guilt of the accused . . . ." *Jackson v Virginia*, 443 US 307, 315; 99 S Ct 2781; 61 L Ed 2d 560 (1979). Accordingly, application of this standard under the ICWA requires a fact finder to conclude with "near certitude" that "the continued custody" of the Indian child by the parent "is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f).

In *Stanley v Illinois*, 405 US 645, 651; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court examined the constitutionality of an Illinois law, under which "the children of unwed fathers become wards of the State upon the death of the mother." *Id*. at 646. Peter Stanley claimed that "he had never been shown to be an unfit parent," and had been unconstitutionally deprived of his children absent a showing of unfitness. *Id*. Illinois responded that "unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." *Id*. at 647. The Supreme Court observed that the Illinois dependency proceeding involving the Stanley children "has gone forward on the presumption that [Stanley] is unfit to exercise parental rights." *Id*. at 648. Regarding

the implicit presumption of unfitness contained within Illinois law, the Supreme Court explained:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [*Id*. at 656-657.]

Unlike Peter Stanley, respondent *was* previously judged unfit. Unquestionably, the circumstances surrounding Daniel's death and the termination of her rights to Aliyah constitute relevant evidence regarding respondent's current parenting abilities. The circuit court, however, utilized a presumption of unfitness predicated solely on historical evidence to "disdain[] present realities in deference to past formalities." Perhaps a fuller record might reveal that respondent *is* completely unfit to parent Ashtyn and that, in respondent's custody, Ashtyn likely would suffer serious emotional or physical harm. But a court lacks the ability to reach these conclusions with certainty beyond a reasonable doubt by relying solely on a presumption that respondent's past unfitness supplies the answer. That logic "forecloses the determinative issues of competence and care," and eviscerates petitioner's heavy burden of proving unfitness.[10]

Here, the circuit court ruled that petitioner met its burden by proving respondent's past unfitness. Petitioner presented no current evidence that respondent's custody of Ashtyn would likely harm the child. By deciding that the circuit court may consider "evidence that the provision of additional services to Finfrock

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[10] The burden of proving parental unfitness rests on the petitioner. *In re AMAC*, 269 Mich App 533, 537; 711 NW2d 426 (2006).

would be futile," the majority endorses a meaningless reiteration of the prior proceedings. If the circuit court accepts the majority's advice that it may rely solely on evidence gleaned from respondent's past, the court inevitably will bypass the ICWA's requirement of proof beyond a reasonable doubt. When current evidence of fitness is omitted, the process is governed by presumption, not proof. I would hold that on remand, the circuit court may not rely on inferences of unfitness, unsupported by current evidence demonstrating beyond a reasonable doubt that Ashtyn faces likely harm if returned to respondent's care.

Because petitioner cannot satisfy the ICWA's reasonable doubt standard in the absence of current active efforts, which it undisputedly neglected to provide, I would reverse.

AMERITECH PUBLISHING, INC v DEPARTMENT OF TREASURY

Docket No. 276374. Submitted June 5, 2008, at Lansing. Decided August 7, 2008. Approved for publication September 30, 2008, at 9:00 a.m.

Ameritech Publishing, Inc., brought an action in the Court of Claims against the Department of Treasury, seeking a use tax refund for the years 1998 through 2000 after the defendant denied a refund request. The use tax had been assessed with regard to telephone directories published by the plaintiff. The directories were printed by a company in Illinois on paper purchased by the plaintiff outside Michigan. The directories were then transported by a carrier under contract with the plaintiff, were delivered to distribution centers located in Michigan, and were then distributed to businesses and residents by a company under contract with the plaintiff for such purposes. The Court of Claims, Paula J. Manderfield, J., upheld the denial of a refund, ruling that the plaintiff used the directories in Michigan for purposes of taxation under the Use Tax Act, MCL 205.91 *et seq*., and that the price of the directories was properly calculated without deduction for the costs of the paper or the printing services. The Court of Claims also determined that the costs of the directories had not been subjected to double taxation. The plaintiff appealed.

The Court of Appeals *held*:

1. The Use Tax Act defines "use" as the exercise of a right or power over tangible personal property incident to the ownership of that property, including transfer of the property in a transaction where possession is given to another. MCL 205.92(b). A distribution of tangible personal property is a "use" subject to the Use Tax Act if the owner of the property exercises a right or power incident to the ownership of that property while the property is distributed in Michigan. The plaintiff did not cede total control of the directories while they were transported and distributed in Michigan. Therefore, the plaintiff used the directories in Michigan and that use was subject to the use tax.

2. The cost of the paper and the printing services were properly included in the price of the directories. The use tax was not imposed directly on the printing services provided by the out-of-state printer. Rather, the cost of the printing services and the

paper were properly used as part of the measure of the use tax imposed for the use of the directories in Michigan.

3. The paper and the printing services were properly included in the aggregate value of the transaction of producing the directories for purposes of determining the use tax amount.

4. The plaintiff's costs in producing the directories was not subjected to double taxation.

Affirmed.

Jaffe, Raitt, Heuer & Weiss, PC (by *Brian G. Shannon* and *Robert E. Lewis*), for the plaintiff.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Michael R. Bell*, Assistant Attorney General, for the defendant.

Before: GLEICHER, P.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM. Plaintiff Ameritech Publishing, Inc. (API), appeals as of right the Court of Claims order affirming the denial of API's request for a use tax refund for the years 1998 through 2000 (the refund period) by defendant Department of Treasury (the Department). Because API "used" the telephone directories in Michigan and the "price" of the directories is to be calculated without a deduction for the costs of materials or services, and because the costs of the directories is not subject to double taxation, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

API[1] and the Department submitted the case to the Court of Claims on the following stipulated facts. API published and distributed telephone directories to busi-

[1] API is a subsidiary of Ameritech Corporation, and Ameritech Corporation is a subsidiary of AT&T, Inc.

ness and residential customers in Michigan. R.R. Donnelly & Sons Company (Donnelly) printed, bound, and cut the directories at its printing facility in Dwight, Illinois.

The publishing of the directories involved three steps. First, API developed the content to be published in the directories. After API completed creating the content, which consisted of a page-by-page presentation of the directories, API provided the content to Donnelly in electronic format. Second, API purchased the paper on which Donnelly was to print the directories. API entered into contracts with non-Michigan paper mills for the paper. Although the paper mills shipped the paper directly to Donnelly's printing facility in Dwight, Illinois, API took title of the paper before Donnelly used the paper to print any directories. Donnelly maintained API's paper separate from all other paper in its plant, and it was only allowed to use API's paper for the directories. Third, API procured printing services from Donnelly. After Donnelly printed the content supplied by API on the paper, Donnelly cut and bound the paper into finished directories.

API entered into an agreement with a contract carrier for transportation of the directories (carrier contract) and with a product development corporation (PDC) for distribution of the directories (distribution contract). The contract carrier transported the finished directories from Donnelly's printing facility in Dwight, Illinois, to the PDC's distribution centers located throughout Michigan. Then, over the course of several weeks, the PDC distributed the directories to local businesses and residences. In general, the PDC's distribution of the directories consisted of two phrases: (1) the "initial distribution," where the PDC completed door-to-door distribution of the directories and mailed

directories to remote and rural areas and to controlled-access locations, such as condominium complexes and gated communities; and (2) the "secondary distribution," which consisted, in part, of the PDC's delivering directories to new telephone users and to customers requesting additional directories.

During the refund period, API remitted use tax to the Department based on the cost of the paper it purchased from the paper mills and the cost of Donnelly's printing services. In February 2002, API sought from the Department a refund in the amount of $3,519,409.13, which equaled the amount of use taxes it alleged it had overpaid during the refund period. The Department denied the refund request, and the Court of Claims upheld the denial.

On appeal, API makes three arguments. First, API argues that, because it exercised no rights or powers over the directories while the directories were in the distribution channel, it did not "use" the directories in Michigan. Second, API argues that, even if the distribution of the directories is subject to the use tax, neither the cost of the paper nor the cost of Donnelly's printing services could be included in determining the "price" of the directories. Third, API argues that, because the directories are a "tie-in" item to the telecommunication services provided by its affiliated companies, the result of allowing defendant to tax its costs of producing the directories would be double taxation.

II. STANDARD OF REVIEW

This Court reviews questions of law de novo. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). This Court also reviews questions of

statutory interpretation de novo. *Herald Wholesale, Inc v Dep't of Treasury*, 262 Mich App 688, 693; 687 NW2d 172 (2004).

Construction of the Use Tax Act (UTA), MCL 205.91 *et seq.*, is subject to the general rules of statutory interpretation. *Brunswick Bowling & Billiards Corp v Dep't of Treasury*, 267 Mich App 682, 684; 706 NW2d 30 (2005). The primary goal of judicial construction of a statute is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). If the language employed by the Legislature is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and this Court must enforce the statute as written. *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007). However, when interpreting a tax statute, this Court must keep in mind that the authority to tax must be expressly provided. See *Molter v Dep't of Treasury*, 443 Mich 537, 543; 505 NW2d 244 (1993). Tax laws will not be extended in scope by implication or forced construction. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 702; 550 NW2d 596 (1996). "When there is doubt, tax laws are to be construed in favor of the taxpayer." *Id.*

III. THE UTA

The use tax is complementary to the sales tax. *WPGP1, Inc v Dep't of Treasury*, 240 Mich App 414, 416; 612 NW2d 432 (2000). The UTA is designed to cover those transactions not covered by the General Sales Tax Act (GSTA), MCL 205.51 *et seq*. *WPGP1*, *supra* at 416. The UTA provides:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personable property

> in this state at a rate equal to 6% of the price of the property . . . ." [MCL 205.93(1).][2]

"It is the use [of the property] in Michigan that is taxed under the [UTA]." *WMS Gaming, Inc v Dep't of Treasury*, 274 Mich App 440, 443; 733 NW2d 97 (2007).

A. "USE"

The UTA defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given" to another. MCL 205.92(b). API claims that, because it did not exercise any rights or powers over the directories while the directories were transported by the contract carrier and distributed by the PDC, it did not "use" the directories in Michigan. In addition, API argues that this Court's decision in *Sharper Image, supra*, suggests that a distribution of tangible personal property does not fall within the definition of "use" under MCL 205.92(b).

In *Sharper Image*, the plaintiff conducted business in Michigan through mail-order catalogs. The catalogs, produced by a printer in Nebraska, were shipped to Michigan residents through the mail from the printer's place of business. The plaintiff retained no control over the catalogs after the catalogs were delivered to the postal service. The Court of Claims held that the plaintiff's distribution of the catalogs in Michigan was a "use" subject to the UTA because it found that the definition of "distribution" was synonymous with the definitions of "give" and "transfer," two terms within the statutory definition of "use."

This Court disagreed:

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[2] Throughout this opinion, we quote the UTA as it existed during the refund period. The UTA has been revised since the refund period.

We conclude the trial court erred in two respects. First, under the plain wording of the statute, in order to be taxed under the UTA, a taxpayer must perform in Michigan one of the activities listed in the definition of "use." MCL 205.93(1); MSA 7.555(3)(1). Here, plaintiff's exercise of a right or power over the catalogs ended when the catalogs were delivered to the postal service in Nebraska.

Second, we find no provision in the statutory definition of "use" to allow defendants to tax the distribution of catalogs. Had the Legislature intended for distributions to be taxed, it could have easily done so by expressly providing it in the definition of use. Indeed, the legislatures of other jurisdictions have done this. See, e.g., *Collins v J C Penney Co, Inc*, 218 Ga App 405; 461 SE2d 582 (1995), and *J C Penney Co, Inc v Olsen*, 796 SW2d 943 (Tenn, 1990).[3] Our Legislature, however, did not include distribution in the definition of use, and we will not extend the tax to that activity absent the statutory authority to do so. *Michigan Bell* [*Tel Co v Dep't of Treasury*, 445 Mich 470, 477; 518 NW2d 808 (1994)].

* * *

We find support for our conclusion from a review of case law from other states. The cases from states in which a use tax has been applied in situations similar to that presented here are dissimilar in two important ways. First, in many of the other jurisdictions, the relevant statute specifically provides for the taxation of distributions. See, e.g., *Collins, supra*, and *Olsen, supra*.

Also, the facts before the courts in the other jurisdictions indicated that the taxpayer enjoyed indicia of control

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[3] The Georgia use tax enabling statute provides "that '[u]pon the first instance of use, consumption, *distribution*, or storage within this state of tangible personal property . . . the owner . . . shall be liable for a tax . . . .' " *Collins*, *supra* at 406-407, quoting Ga Code Ann 48-8-30(c) (emphasis added). The Tennessee use tax statute applies to tangible personal property " 'when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state . . . .' " *J C Penney Co*, *supra* at 945, quoting Tenn Code Ann 67-6-203 (emphasis added).

> over the material not here present. Such indicia of control included the power to determine in what publications the advertisements were to be placed and at what time they would be distributed. See *Mervyn's v Arizona Dep't of Revenue*, 173 Ariz 644; 845 P2d 1139 (1993), and *K Mart Corp v Idaho State Tax Comm*, 111 Idaho 719; 727 P2d 1147 (1986).
>
> In those jurisdictions having statutory language similar to that in Michigan, and applying that language to facts similar to those presented here, the use tax has been held inapplicable. See, e.g., *Modern Merchandising, Inc v Dep't of Revenue*, 397 NW2d 470 (SD, 1986), and *Wisconsin Dep't of Revenue v J C Penney Co, Inc*, 108 Wis App 2d 662; 323 NW2d 168 (1982). Indeed, many of the courts addressing this issue rely on the distinction between those companies exercising control over their mailings and those not exercising such control. See, e.g., *Modern Merchandising, supra*, and *Mervyn's, supra*. [*Sharper Image, supra* at 702-704.]

We disagree with API's assertion that the Court's holding in *Sharper Image* suggests that a distribution of tangible personal property can never be a taxable "use" of the property under the UTA. In *Sharper Image*, the Court's holding that the plaintiff's distribution of the catalogs in Michigan was not subject to a use tax was two-fold: (1) the plaintiff did not exercise "a right or power" over the catalogs in Michigan, and (2) the Legislature did not include distributions within the list of activities subject to the UTA. *Id.* at 702-703. On the basis of the first part of the Court's holding, we conclude that under MCL 205.92(b) a distribution of tangible personal property is a "use" subject to the UTA if the owner of the property exercised "a right or power . . . incident to the ownership of that property" while the property was in Michigan.[4]

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[4] See *K Mart Corp*, *supra* at 721 ("In light of . . . the exercise by K Mart, through its contracts, of rights and powers over the inserts incident to their ownership, K Mart uses the inserts within the meaning of the use tax statute.").

An owner of tangible personal property no longer exercises "a right or power over tangible personal property incident to the ownership of that property" when it has ceded total control of the property to a third party. *WPGP1, supra* at 418-419. In *WPGP1*, the plaintiff purchased two airplanes at a foreclosure sale. At the time of the purchase, the airplanes had been leased to Southwest Airlines, Inc., and were used by Southwest as commercial passenger airplanes. The plaintiff's purchase of the airplanes did not terminate Southwest's lease of the airplanes, nor did the purchase interrupt Southwest's continuous use of the airplanes in interstate commerce. According to the Department of Treasury, by owning the airplanes, leasing the airplanes to Southwest, and allowing Southwest to fly the airplanes into and out of a Detroit airport, the plaintiff "used" the airplanes in Michigan within the meaning of the UTA.

On appeal, this Court disagreed, *id.* at 417-419, finding that if any entity "used" the airplanes within Michigan, it was Southwest:

> [I]t is undisputed that plaintiff bought the airplanes subject to preexisting leases with Southwest. Under the leases, Southwest completely controlled the flight schedules and the routine maintenance of the airplanes. In addition, the leases held Southwest responsible for ensuring that the aircraft remained registered with the FAA [Federal Aviation Administration] in the name of the lessor. Under the UTA, the tax is imposed for "the privilege of using, storing, or consuming tangible personal property in this state . . . ." MCL 205.93(1); MSA 7.555(3)(1). If any of these privileges were utilized, it was done by Southwest, not plaintiff. "Use" means "*the exercise of a right or power* over tangible personal property incident to the ownership of that property . . . ," MCL 205.92(b); MSA 7.555(2)(b) (emphasis supplied), which plaintiff did not do. Because of the leases, plaintiff at no time used, stored, or consumed the property in Michigan. Despite plaintiff's ownership

> interest in the airplanes, the leases gave exclusive authority over the use, storage, and consumption of the airplanes during the duration of the leases to Southwest, and thus plaintiff exercised no right or power over the airplanes. In other words, by virtue of the leases, plaintiff ceded control of the airplanes to Southwest, and therefore could not have "used" the airplanes for purposes of use tax liability under the UTA.
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> . . . While the leases did not give Southwest *permanent* control of the airplanes, we conclude that the leases gave Southwest *total* control of them, because pursuant to the leases Southwest was responsible for the flight schedules and general maintenance of the planes. Plaintiff did not direct Southwest's routes or otherwise exercise dominion over Southwest's use of the planes. [Emphasis in original.]

In this case, a review of the carrier contract and the distribution contract establishes that API did not cede total control of the directories while the directories were transported in Michigan by the contract carrier or when they were distributed to Michigan businesses and residences by the PDC. Pursuant to the carrier contract, API's responsibilities included the "scheduling of directory printing, transportation and distribution from [Donnelly's plant in Dwight, Illinois] to the end user." Pursuant to the distribution contract, the PDC was to complete the initial delivery by the date specified by API.[5] The distribution contract provided that in completing the door-to-door distribution of the directories to residences, the PDC was to place each directory in a bag[6] and then place the directory on the hinged side

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[5] The distribution contract refers to SBCDO (SBC Distribution Office). We assume SBC is the parent company of API.

[6] The distribution contract also required the PDC to place in the bag any advertising inserts, such as coupons, product samples, magnets, or CD-ROMS, submitted by Advertising Media Solutions. The PDC was given instructions on where to place the advertising inserts in the bag relative to the directory.

of the door; the PDC was not to place the directory in the residence's mailbox. Delivery of directories to residences was to take place between dusk and dawn. However, door-to-door distribution of directories to businesses was only to take place between the hours of 8:00 a.m. and 6:00 p.m. The PDC was to deliver the directories inside the place of business, and it was required to obtain customer signatures from a certain percentage of the businesses.[7]

In completing the initial mail distribution, the PDC was to shrink-wrap all directories to be mailed and deliver the directories to the local post office five or eight days, depending on the number of directories to be mailed, before the delivery start date.[8] The PDC could not convert a hand delivery route into a mail route without the approval of API. In addition, in completing the secondary distribution, the PDC was required to hand deliver directories to a minimum of 65 percent of the new telephone customers.

The distribution contract required the PDC to implement a quality-assurance program using an Interactive Voice Response (IVR) system. API reserved the right to approve any IVR script used by the PDC. Requirements regarding how many IVR confirmations of receipt of the directory the PDC must obtain for each delivery route

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[7] The PDC was responsible for obtaining adequate staffing for distribution of the directories. However, the distribution contract provided the minimum requirements for adequate staffing, which included a management team, an administrative staff, a distribution staff, and data processors.

The PDC was also responsible for securing leases for offices and warehouses necessary for it to fulfill its responsibilities under the distribution contract. However, API reserved the right to review and approve any lease executed by the PDC.

[8] The distribution contract contained instructions on where the PDC was to place the mailing label on mailed directories.

were specified in the distribution contract, as were instructions for when a delivery route must be pulled for manual investigation and instructions on how to complete a manual investigation. And, it was API, rather than the PDC, who held the ultimate authority to decide whether to redeliver directories on a given route.

Throughout the distribution cycle, the PDC was required to provide API with numerous reports regarding its quality-assurance program and the number of directories delivered. The reports included a daily report chronicling the progress of the door-to-door initial distribution, weekly and monthly reports on the number of directories mailed during the initial distribution, and monthly reports regarding the number of directories delivered and mailed during the secondary distribution. Finally, pursuant to the distribution contract, all directories remaining at the end of a distribution cycle remained the property of API and were to be disposed of by API's recycling supplier of choice.

Here, unlike the plaintiff in *Sharper Image* who lost all control over the catalogs once the catalogs were delivered to the post office, API never lost all control over the directories after the directories were transported from Donnelly's printing facility to the PDC's distribution centers. In other words, although it was the PDC's responsibility to distribute the directories to Michigan residences and businesses, the PDC did not have exclusive authority over the distribution. API informed the PDC of the date a distribution was to be completed. API instructed the PDC on what hours it was to distribute the directories, where it was to place the directories at a residence, and, when directories were to be mailed, when they were to be received by the local post office. Through the reports the PDC was

required to provide, API continually monitored the PDC's progress in distributing the directories. API also set the minimum requirements for the PDC's staffing, and instructed the PDC on the type of quality-assurance program it was to implement. API retained possession of any unused directories, which were to be disposed of by the recycler of API's choice. Under these circumstances, API exercised "a right or power over [the directories] incident to the ownership of [the directories]," MCL 205.92(b), while the directories were in Michigan. Accordingly, API "used" the directories in Michigan.

B. PRICE

A person using tangible personal property in Michigan shall pay use tax "at a rate equal to 6% of the price of the property . . . ." MCL 205.93(1). The UTA defines the "price" of property, in pertinent part, as

> the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in the consummation and complete performance of the transaction by which tangible personal property or services are purchased or rented for storage, use, or other consumption in this state, without a deduction for the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense. [MCL 205.92(f).]

The Department determined that the "price" of the directories included the cost of the paper and the cost of Donnelly's printing services. API argues that neither should be included in the "price" of the directories.

1. PRINTING SERVICES

API claims that the cost of the printing services provided by Donnelly cannot be included in the "price" of the directories because, pursuant to *Flexitype & Douglas Offset Co v Dep't of Treasury*, 52 Mich App 153;

216 NW2d 609 (1974), printing services are not subject to the sales tax. API argues that, because of the complementary nature of the UTA and the GSTA, the UTA was not intended to tax services that are not taxable under the GSTA. In this regard, API points out that, during the refund period, the UTA only provided for the taxation of telecommunication services and hotel services. See MCL 205.93a. In addition, API claims any conclusion that the cost of the printing services are to be included in the "price" of the directories would render meaningless the Supreme Court's adoption of the "incidental to service" test in *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004).

The GSTA provides for a tax on the gross proceeds of sales at retail of tangible personal property. *Univ of Michigan Bd of Regents v Dep't of Treasury*, 217 Mich App 665, 669; 553 NW2d 349 (1996); *Flexitype, supra* at 155; see also MCL 205.52(1). Generally, the GSTA does not apply to sales of services. *Catalina, supra* at 19.

In *Flexitype*, Flexitype, a commercial printing company, agreed to print Detroit Edison's company magazine. Detroit Edison provided the paper and all matter to be printed on the paper. Flexitype was only required to print the magazine, assemble it into a finished product, and deliver it to Detroit Edison. In billing Detroit Edison, Flexitype did not charge a sales tax. However, the defendant, the Department of Treasury, issued sales tax assessments against Flexitype for the period it provided printing services to Detroit Edison. The disputed issue was whether Flexitype had made a sale at retail to Detroit Edison. This Court found determinative of the issue the then-existing definition of "sale at retail": " 'any transaction by which is transferred for consideration *the ownership of tangible per-*

*sonal property * * *.' " Flexitype, supra* at 156, quoting MCL 205.51(b) (emphasis in original). According to the Court, Flexitype did not make a sale at retail because it never owned either the tangible or intangible content of the magazines. *Flexitype, supra* at 156. Rather, at all times, Detroit Edison controlled and owned the tangible and intangible content of the magazines. *Id.*

In *Catalina, supra*, Catalina contested the assessment of sales tax by the defendant, the Department of Treasury, on its Checkout Coupon™ program. Under the program, Catalina contracted with manufacturers of consumer products to deliver a coupon or advertising message to shoppers as they checked out at a grocery store on the basis of what the shoppers had bought. It was undisputed that Catalina's transactions with the manufacturers involved both the provision of services —advertising research and expertise—and the transfer of tangible personal property—slips of paper with coupons or advertising messages. Because the GSTA only applies to sales of tangible personal property, not the sales of services, it was necessary to categorize the transactions as either a service or a tangible property transaction. *Catalina, supra* at 19. The Supreme Court adopted the "incidental to service" test for categorizing a transaction involving both the provision of services and the transfer of tangible personal property as either a sale of services or a sale of tangible personal property. *Id.* at 24. Under this test, " 'sales tax will not apply to transactions where the rendering of a service is the object of the transaction, even though tangible personal property is exchanged incidentally.' " *Id.*, quoting 85 CJS 2d, Taxation, § 2018, p 976.[9]

[9] The Supreme Court remanded the case to the Tax Tribunal to apply the "incidental to service" test. *Catalina*, *supra* at 26. In a subsequent order, the Supreme Court affirmed the decision of the Tax Tribunal on

API contends that application of the "incidental to service" test to the facts of the present case dictates a conclusion, consistent with *Flexitype*, that the object of its transaction with Donnelly was the procurement of a service. We need not decide this issue.

The Court's holding in *Flexitype* and our Supreme Court's adoption of the "incidental to service" test in *Catalina* are not relevant to whether the Department properly included the cost of Donnelly's printing services in the "price" of the directories. The issue in both *Flexitype* and *Catalina* was whether there had been a taxable event, i.e., a sale at retail of tangible personal property. However, in the present case, we have already concluded that there was a taxable event, i.e., API's "use" of the directories in Michigan. See part III(A) of this opinion. Having determined there was a taxable event, the issue is whether, pursuant to MCL 205.92(f), the Department properly included the cost of Donnelly's printing services in the "price" of the directories. The analysis of this issue must start with the language of MCL 205.92(f), see *Hills of Lone Pine Ass'n v Texel Land Co, Inc*, 226 Mich App 120, 123; 572 NW2d 256 (1997) ("The starting point in every case involving construction of a statute is the language itself."), not whether printing services are a taxable event under the GSTA. Moreover, by relying on *Flexitype* and *Catalina*, along with the fact that during the refund period the UTA only taxed a limited number of services, API's argument fails to account for the distinction between the *imposition* of a tax and the *measure* of the tax. In this case, the Department imposed a use tax on API because API "used" the directories in Michigan. The Department did not directly impose the use tax on the

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remand that Catalina's provision of services provided to the manufacturers was the object of the transaction. *Catalina Marketing Sales Corp v Dep't of Treasury*, 471 Mich 1209 (2004).

printing services provided by Donnelly. Rather, the Department used the cost of Donnelly's printing services, along with the cost of the paper, as part of the *measure* of the use tax it imposed for API's use of the directories in Michigan.

2. PAPER

API argues that, because the paper was consumed in Illinois, rather than in Michigan, when it was converted into the directories, the cost of the paper cannot be included in the "price" of the directories. API's argument is based on the *Morton Buildings* cases. See *Morton Bldgs, Inc v Indiana Dep't of State Revenue*, 819 NE2d 913 (Ind Tax Ct, 2004); *Morton Bldgs, Inc v Comm'r of Revenue*, 43 Mass App Ct 441; 683 NE2d 720 (1997); *Sharp v Morton Bldgs, Inc*, 953 SW2d 300 (Tex App, 1997); *Morton Bldgs, Inc v Bannon*, 222 Conn 49; 607 A2d 424 (1992); *Morton Bldgs, Inc v Chu*, 126 AD2d 828; 510 NYS2d 320 (1987), aff'd 70 NY2d 725 (1987).

The facts in each of the *Morton Bldgs* cases were the same and were undisputed. Morton Buildings engaged in the production, selling, and on-site erection of prefabricated buildings for agricultural and industrial use. Morton purchased raw materials, including steel and timber, and stored the materials in warehouses as inventory. When Morton Buildings received an order for a building from a customer, it removed the necessary materials to build the building from its inventory. It then fabricated the materials into finished building components, such as trusses, columns, purlins, panels, and overhang rafters, and transported the finished components to the building site in the taxing state.[10] At the building site, Morton Buildings

[10] Neither the warehouses in which Morton Buildings stored its inventory nor the factories where Morton Buildings fabricated the finished building components were located in the taxing states.

erected the building. The issue in each case was whether the taxing state could impose a use tax on Morton Buildings' use of the building components it fabricated outside the taxing state. In each taxing state, the use tax statute imposed a use tax on all tangible personal property used in the state that was purchased from a "retailer" or a "vendor" (or acquired in a "retail transaction"). Morton Buildings argued that, because it fabricated the materials into the finished building components in factories outside the taxing state, the tangible personal property purchased from a retailer, i.e., the materials, had been used outside the taxing state, while the tangible personal property it used inside the taxing state, i.e., the building components, had not been purchased from a "retailer." The courts in the above-cited *Morton Bldgs* cases agreed. For example, the Indiana Tax Court wrote:

> Manufacturing, by its very nature, results in raw materials losing their identity and becoming part of a new item of tangible personal property. . . .
>
> The Stipulation of Facts reveals that the raw materials go through an extensive production process in Morton's out-of-state factories before they are brought into Indiana as building components. The materials are processed through Morton's machinery, cut to size, and affixed to other materials. . . . The result of this process is a building component that has an entirely different appearance, character, and utility than the raw materials used to fabricate it. In other words, the raw materials are consumed in the out-of-state production process. What remains are the building components, which are not taxable when used in Indiana because they were not acquired in a retail transaction. [*Morton Bldgs, supra*, 819 NE2d at 916-917.][11]

[11] But see *Morton Bldgs, Inc v Comm'r of Revenue*, 488 NW2d 254, 258 (Minn, 1992), in which the Minnesota Supreme Court rejected Morton Buildings' argument:

We do not find the *Morton Bldgs* cases to be relevant regarding whether the Department properly included the cost of the paper in the "price" of the directories. Like *Flexitype, supra*, and *Catalina, supra*, the issue in the *Morton Bldgs* cases was whether there had been a taxable event, i.e., whether Morton Buildings used tangible personal property purchased "at retail" in the taxing state. However, as already stated, we have already concluded that API's "use" of the directories in Michigan was a taxable event. See part III(A) of this opinion. Thus, the issue is whether, pursuant to MCL 205.92(f), the Department properly included the cost of the paper in the "price" of the directories. Because the *Morton Bldgs* cases did not construe language similar to that contained in the definition of "price" in MCL 205.92(f), we do not find the cases relevant to the issue before us.

3. AGGREGATE VALUE

Under the UTA, the price of tangible personal property "used" in Michigan is "the aggregate value in money of anything paid . . . by a consumer to a seller[12]

In our opinion, Morton's manufacturing process does not transform the raw materials into something which is not used in Minnesota. Despite their alteration at the factories, the raw materials are still tangible personal property used in Minnesota as parts of Morton's prefabricated buildings. The raw materials, in their altered form as building components, are used in Minnesota when they are erected into prefabricated buildings. Morton clearly exercises a right or power over the raw materials when it constructs the prefabricated building, and thus Morton "uses" the materials in Minnesota.

[12] Neither party contests that API is a "consumer." "Seller" is defined as "the person from whom a purchase is made and includes every person selling tangible personal property or services for storage, use, or other consumption in the state." MCL 205.92(d). The UTA defines "purchase" as "to acquire for a consideration . . . ." MCL 205.92(e). Here, API

in the consummation and complete performance of the transaction . . . ." MCL 205.92(f). Here, the complete performance of the transaction includes the production of the directories. API's purchase of the paper from the paper mills and its purchase of printing services from Donnelly were necessary and incidental to the transaction. See *Kal-Aero, Inc v Dep't of Treasury*, 123 Mich App 46, 51; 333 NW2d 171 (1983). API could not have obtained the directories without purchasing the paper or without purchasing Donnelly's printing services. Paper and printing services are necessary to the mass production of any telephone directory.

The aggregate value of the transaction is to be determined "without a deduction for the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense." MCL 205.92(f). By arguing that neither the cost of printing services nor the cost of the paper can be included in the "price" of the directories, API is essentially asking for a deduction equivalent to the cost of materials used and services provided. MCL 205.92(f) unambiguously prohibits such deductions, and we must enforce an unambiguous statute as written, *Rowland, supra*. Accordingly, because API paid the cost of the paper and the cost of printing services in the complete performance of the transaction, the Department correctly included the costs of the paper and the printing services in the "price" of the directories.

C. DOUBLE TAXATION

Finally, API claims that, because the customers of the telecommunication services provided by its affiliated

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acquired for consideration printing services from Donnelly and paper from the paper mills. Accordingly, because purchases were made from them, Donnelly and the paper mills are "sellers."

companies are required to remit use tax on those services, see MCL 205.93a, if the Department is allowed to tax API's costs of producing the directories, the costs of the directories would be subject to double taxation.

In making its argument, API relies solely on the following two paragraphs from the Department's Revenue Technical Tax Training Manual:[13]

> If a company sells 1,000 items of its product to a customer and gives the customer an additional 10 items of the product free, the additional 10 items are not considered taxable giveaway items. There is one gross selling price on the 1,010 items. The gross proceeds would be the amount charged for the 1,000 items.
>
> *A "tie-in" sale requires someone to first buy tangible personal property in order to receive a different item free.* There is an advertisement that an item will be received free at the time of purchase. The advertised item given away with the "tie-in" sale is not subject to use tax. A portion of the gross proceeds received from the sale is attributed to the free item. [Emphasis added.]

Even assuming that the manual cited by API carries the force of law, API's argument is without merit. API claims that the directories were a "tie-in" to the telecommunication services provided by its affiliated companies. However, telecommunication services are not tangible personal property. API has presented no evidence that the customers of its affiliated companies bought any tangible personal property before receiving the directories.

Double taxation occurs when a second tax is imposed on the same property, for the same purpose, and by the

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[13] This manual was prepared as an "instructional text" to be used in classroom training on the GSTA and the UTA. It expressly stated that it was "not intended as a statement of law" and was "intended only for training purposes."

same sovereign during the same taxing period. *C F Smith Co v Fitzgerald*, 270 Mich 659, 685; 259 NW 352 (1935). API has not proffered any evidence that the use tax paid by the customers of the telecommunication services provided by its affiliated companies is based, in part, on the costs paid by API in purchasing the paper used in the directories or in purchasing Donnelly's printing services. Accordingly, API's costs in producing the directories are not subject to double taxation.

Affirmed.

BONKOWSKI v ALLSTATE INSURANCE COMPANY

Docket No. 273945. Submitted March 11, 2008, at Detroit. Decided October 2, 2008, at 9:00 a.m. Leave to appeal sought.

Shaun Bonkowski brought an action in the Oakland Circuit Court against Allstate Insurance Company, his no-fault automobile insurer, seeking an increase in the hourly rate his father, Andrew Bonkowski, was to be paid for around-the-clock attendant care for the plaintiff. The plaintiff had been nearly paralyzed from the neck down as a result of an automobile accident. Andrew had received from personnel in a hospital specializing in quadriplegia and closed head injuries extensive training on care for the plaintiff. The defendant had decided to pay Andrew at $19 an hour, which was the average of the hourly rates for registered nurses, licensed professional high-tech nurses, and licensed practical nurses. However, the plaintiff had sought $34 an hour. Following a jury trial, the court, Charles W. Simon, Jr., J., entered a judgment on a jury award to the plaintiff of $1,381,114 in attendant-care benefits and $349,609.67 in penalty interest of 12 percent a year (as allowed by MCL 500.3148[1] when a denial of benefits is unreasonable). Also included in the judgment were the trial court's awards of $10,546.85 in costs, $249,750 in attorney fees pursuant to MCL 500.3148, and $525,126.35 in judgment interest under MCL 600.6013. The defendant appealed the denial of its motion for judgment notwithstanding the verdict and the award of attorney fees under MCL 500.3148. The plaintiff cross-appealed the denial of attorney fees as case-evaluation sanctions under MCR 2.403 and the trial court's failure to impose through the satisfaction of the judgment the 12 percent penalty interest under MCL 500.3142(3). The plaintiff also sought appellate attorney fees under MCL 500.3148 and MCR 7.216(c), claiming that the defendant's appeal was vexatious.

The Court of Appeals *held*:

1. The trial court properly denied the defendant's motion for judgment notwithstanding the verdict. MCL 500.3107(1)(a) provides, in part, that personal protection insurance benefits are payable for reasonable charges incurred for reasonably necessary services for an injured person's care. The statute does not require

that services be supplied by trained medical personnel, and family members should be compensated for services they provide at home to an injured person in need of care. In this case, it is not disputed that the plaintiff needs 24-hour attendant care and there was sufficient evidence to support the jury's determination that the compensation offered to Andrew was not adequate, given the training he received and the care he provided to the plaintiff.

2. The trial court erred by awarding the plaintiff attorney fees pursuant to MCL 500.3148(1). When considering whether attorney fees are warranted under that statute, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable. A delay in payment is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. It appears that the trial court only considered the jury's conclusion that Andrew was entitled to greater compensation than that offered by the defendant. The defendant established that its initial refusal to pay Andrew at a higher rate was based on a bona fide and legitimate dispute over proper compensation for attendant-care services provided by an individual who is not a licensed health-care professional. The award of attorney fees under MCL 500.3148(1) must be vacated.

3. On remand, the trial court shall determine whether the plaintiff is entitled to case-evaluation sanctions under MCR 2.403. To the extent case-evaluation sanctions are appropriate, the trial court shall not rely on its prior assessment of attorney fees under MCL 500.3148 and shall follow the method of awarding such fees set by the Supreme Court in *Smith v Khoury*, 481 Mich 519 (2008).

4. The plaintiff is not entitled to 12 percent penalty interest under MCL 500.3142(3) after the entry of judgment and continuing through the satisfaction of judgment. Interest under MCL 500.3142(3) is part of the awarded damages, and MCL 500.3142(3) may not be applied postjudgment to provide for an award of interest on the judgment in addition to the judgment interest allowed by MCL 600.6013 from the date the complaint was filed to the date the judgment is satisfied.

5. The plaintiff has not established a claim for appellate attorney fees under MCL 500.3148(1) or MCR 7.216(C)(1). It is the trial court, not the Court of Appeals, that considers claims for attorney fees under MCL 500.3148(1). A request for sanctions under MCR 7.216(C)(1) must be made by motion, not in a brief as the plaintiff has done. Moreover, because the defendant has prevailed in part on appeal, its appeal cannot be considered vexatious.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — REFUSAL TO PAY OR DELAY IN PAYING INSURANCE BENEFITS — ATTORNEY FEES.

The proper inquiry when considering whether attorney fees are warranted under the no-fault act for the unreasonable refusal or delay in making proper payment of personal protection insurance benefits is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable; delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty (MCL 500.3148[1]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — OVERDUE PAYMENTS — PENALTY INTEREST.

The 12 percent penalty interest allowed by the no-fault act for overdue personal protection insurance benefits may not be applied to provide interest on the judgment in addition to the judgment interest allowed by the Revised Judicature Act (MCL 500.3142, 600.6013).

Liss and Associates, P.C. (by *Nicholas S. Andrews* and *Arthur Y. Liss*), and *Larry A. Smith* for the plaintiff.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *Simeon R. Orlowski*), for the defendant.

Before: TALBOT, P.J., and CAVANAGH and ZAHRA, JJ.

ZAHRA, J. In this attendant care benefit case brought under the Michigan no-fault act, MCL 500.3101 *et seq*., defendant, Allstate Insurance Company, appeals as of right a $2,541,146.87 jury verdict in favor of plaintiff, Shaun Bonkowski. The judgment entered on the verdict reflects the jury award of $1,730,723.67 in past due attendant care benefits, $10,546.85 in costs, $249,750 in attorney fees (549.5 hours at $500 an hour) pursuant to MCL 500.3148, and $525,126.35 in statutory interest pursuant to MCL 600.6013. The judgment denied plain-

tiff's requests for additional attorney fees as case evaluation sanctions pursuant to MCR 2.403. The judgment also denied a request for 12 percent penalty interest under MCL 500.3142(3), running from the entry of the judgment through the satisfaction of judgment. Defendant appeals the denial of its motion for judgment notwithstanding the verdict (JNOV), the award of attorney fees under MCL 500.3148, and the amount of attorney fees awarded. Plaintiff cross-appeals the trial court's denial of attorney fees under MCR 2.403 and the trial court's failure to impose through the satisfaction of judgment the 12 percent penalty interest under MCL 500.3142(3). Plaintiff also requests attorney fees on appeal pursuant to MCL 500.3148 and MCR 7.216(C), claiming that defendant's appeal is vexatious. We affirm the denial of the motion for JNOV and the denial of a 12 percent penalty interest through the satisfaction of judgment under MCL 500.3142(3). We reverse the attorney fees awarded under MCL 500.3148 and the trial court's denial of reasonable attorney fees under MCR 2.403. We vacate the award of attorney fees and remand for a determination of reasonable attorney fees, if any, awardable under MCR 2.403 and consistent with *Smith v Khoury*, 481 Mich 519; 751 NW2d 472 (2008).

I. FACTS AND PROCEDURAL HISTORY

On June 3, 2001, 18-year-old Shaun Bonkowski, plaintiff, was struck by an automobile and suffered extensive and tragic injuries, including a spinal cord injury that left him nearly paralyzed from the neck down. He also suffered a traumatic brain injury, which impairs his short-term memory and ability to concentrate, and causes him emotional problems. Despite his injuries, plaintiff is able to operate a powered wheelchair and, with devices attached to his wrist, plaintiff

can feed himself and use a computer keyboard. The driver of the vehicle that struck plaintiff was never located. Plaintiff was nonetheless insured under a no-fault automobile insurance policy issued by defendant.

Plaintiff initially received treatment at St. Joseph's Mercy Hospital until August 15, 2001. On that day, defendant arranged for plaintiff, along with his father, Andrew, to travel by a medical air service to the Craig Hospital (the Craig) in Colorado, an institution that specializes in quadriplegia and closed head injuries. Plaintiff and Andrew resided at the Craig until December 1, 2001. While there, Andrew received extensive training on how to care for plaintiff. A nonexhaustive list of the care that Andrew provides to plaintiff includes: administering oral medication, detecting and assessing pain, diagnosing dysreflexia (a potentially lethal condition involving a rise in blood pressure in a paraplegic), clearing lungs, administering a bowel program, preventing and treating skin ailments, physical therapy (moving his arms and legs to maintain a range of motion), attending to emotional concerns, maintaining hygiene and tending to dietary needs. Dr. Owen Perlman, physiatrist and plaintiff's primary treating physician, characterized Andrew's care of plaintiff as interdisciplinary or multidisciplinary, in that different aspects of plaintiff's care would be performed by different health care professionals, including nurses, physical therapists, respiratory therapists, psychologists, etc.

Laura Kling, a registered nurse employed by a private rehabilitation company that coordinates plaintiff's health care services, became involved with plaintiff's care when he was admitted at St. Joseph's and managed plaintiff's care from 2003 to 2005. She participated in the discharge planning process at the Craig. She observed that Andrew, through the training provided at

the Craig, obtained all the skills required to be an excellent caregiver to plaintiff. Despite Andrew's not having previous medical training and having obtained only the equivalent of a high school degree, the Craig discharged plaintiff to Andrew's care.

Defendant's employee, Jan Mainella was assigned to plaintiff's claim on June 9, 2001. Mainella received preliminary reports from Kling and plaintiff's attending physician at the Craig indicating that plaintiff would require 24-hour attendant care from a high-tech professional nurse or a registered nurse. Mainella also learned that plaintiff anticipated that Andrew would provide plaintiff 24-hour attendant care. Mainella recognized that while Andrew was not a high-tech professional nurse or a registered nurse, he was entitled to reasonable compensation for the care he provided to plaintiff. Mainella, using the Home Care Salary and Benefit Report, 2001-2002 (Report), determined what she deemed to be reasonable compensation payable to Andrew. Pursuant to that Report, the typical hourly salaries paid to Michigan nurses were $19.57 an hour for registered nurses, $22.80 an hour for licensed professional high-tech nurses, and $14.67 an hour for licensed practical nurses. Mainella decided that $456 a day was reasonable compensation for Andrew for providing Shaun 24-hour attendant care. She arrived at this amount by multiplying $19, the average of the above hourly rates, by 24 hours, because Andrew would be providing plaintiff with around–the-clock care. Thus, defendant agreed to pay Andrew approximately $166,000 a year to provide attendant care to plaintiff.

On August 29, 2001, well before the Craig discharged plaintiff to Andrew's care, plaintiff's counsel sent a letter to defendant demanding that Andrew be paid $34 an hour for the attendant care he was to provide.

Defendant declined to increase the amount it intended to pay Andrew, and plaintiff filed this lawsuit on October 4, 2001. Defendant paid Andrew at a rate of $166,000 a year to attend to plaintiff. Defendant did not deny any requests relating to plaintiff's care, aside from plaintiff's request to increase the compensation paid to Andrew to provide 24-hour attendant care to plaintiff. On January 8, 2002, defendant offered to provide Andrew health care insurance.

At trial, plaintiff presented evidence that, upon discharge from the Craig, plaintiff's attending physician prescribed him 24-hour high-tech licensed practical nurse (LPN)[1] or registered nurse (RN) care. Plaintiff established that after returning home, Dr. Perlman similarly prescribed plaintiff "24 hour high-tech LPN" attendant care, from January 29, 2002, to the date of trial. In a deposition admitted at trial, Dr. Perlman described the care Andrew provides to plaintiff as the equivalent of the care provided by a "24-hour high-tech licensed professional nurse or even a registered nurse." Kling similarly testified that, "there is no question" that Andrew "has the knowledge, skill and expertise to provide the care for his son." Gerald Shiener, a board certified psychiatrist, testified that Andrew's care met or exceeded plaintiff's psychological needs in an appropriate manner.

Plaintiff also presented evidence that the training from the Craig was "unbelievable." Kling testified that not all registered nurses or high-tech licensed professional nurses could provide the care that Andrew provides to plaintiff because they would need additional

[1] Many witnesses used the terms "high-tech practical nurse" and "high-tech professional nurse" interchangeably. The record is unclear about whether these are two distinct positions that require different levels of training.

training. She testified that even as a registered nurse, she could not provide care for a person with a spinal cord injury because she had not had the specific training. She also testified that the best place for someone with plaintiff's maladies would be at home with family caregivers.

Kling testified that licensed home health care professionals could be retained through the use of a health care agency. Such an agency would charge $37 to $40 an hour for a high-tech licensed practical nurse and $50 an hour for a registered nurse. Robert Ancell, a vocational rehabilitation counselor and case manager familiar with plaintiff's care, testified that "he had an understanding of what the costs are of different types of care that are needed for various medical conditions like [plaintiff's.]" He testified that a high-tech licensed practical nurse would cost $40 an hour and that a registered nurse would cost $50 an hour, not including shift premiums and overtime. He also testified that physical therapy sessions cost $125 an hour, respiratory therapist sessions cost $75 a visit, and that behavioral therapist sessions cost $40 to $80 an hour. Ancell prepared an exhibit introduced at trial indicating that plaintiff's attendant care would have cost $3,205,125 if provided by a registered nurse, which defense counsel noted amounted to $80 an hour.

On cross-examination, defense counsel elicited testimony that Ancell's testimony was based on agency rates, and that the person actually providing the care would receive less than the agency rate. Defense counsel also elicited testimony that an agency rate, in addition to providing a profit for the agency, assumes costs such as workers' compensation insurance, professional liability insurance, malpractice insurance, health insurance, disability insurance, a secretarial staff, rent,

legal fees, accounting costs, and office supplies. On re-direct examination, Ancell noted that Andrew does not receive many of the benefits listed above.

Defendant presented Mainella as its only witness at trial. In addition to testifying about how she determined Andrew's compensation, she testified that she did not consider the compensation paid to home health care agencies, occupational therapists, physical therapists, or behavioral technicians, though she knew that Andrew provided plaintiff this type of care. She testified that defendant was unwilling to pay the agency rate for Andrew to care for plaintiff because an agency is licensed and incurs more expenses. In response to the question, "If Andy wasn't there, [defendant] would have to pay a lot more money than they're paying right now, right?" Mainella replied, "Willingly." She testified, "I want to pay [Andrew] a reasonable and fair rate for the care he provides his son." She explained that, although Dr. Perlman prescribed attendant care from a registered nurse or a high-tech professional nurse, she averaged in the hourly rate of licensed practical nurses to account for more basic care that plaintiff would provide.

On cross-examination, Mainella admitted that she had assumed that hourly rates listed in the Report did not include benefits of employment. She admitted that, although the Report provided for cost of living increases, she continued to pay Andrew $19 an hour because of pending litigation. She admitted that in determining Andrew's hourly rate she did not consider paying him more for being on call or on overtime. She also admitted that she did not consider that the Report indicated that a registered nurse receives $35.47 an hour for the second shift, $44.33 an hour for the third shift, and $42.28 an hour for the weekend shift. She also

admitted that she did not consider that the Report indicated that an occupational therapist made $49.31 an hour and that a physical therapist made $50.06 an hour. She admitted that Andrew does not receive any of the 22 fringe benefits listed in the Report. She testified that, if Andrew wanted fringe benefits, he could apply for a position at an agency and they could send him to care for plaintiff.

The jury returned a unanimous verdict in favor of plaintiff. The jury specifically found that "the amount of allowable expense owed to the plaintiff" was $1,381,114. The jury also found that the "payment for any of the expenses or losses to which plaintiff was entitled was overdue" and that the amount of interest owed, at 12 percent per annum, was $349,609.67.

Defendant moved for a directed verdict at the close of plaintiff's proofs and for JNOV after the verdict was returned. Both motions were denied. In denying the motion for JNOV, the trial court stated that "reasonable minds obviously could differ" in regard to whether $19 [an hour] was reasonable and noted that defendant did not present an expert at trial. Notwithstanding the trial court's conclusion that reasonable minds could differ about whether compensating Andrew at a rate of $19 an hour for 24 hours a day and 365 days a year was reasonable, the trial court later awarded plaintiff $249,750 in attorney fees under the no-fault act.[2] The judgment stated the trial court's conclusion that defendant "unreasonably delayed in making proper payment on no-fault benefits due to plaintiff[.]" The trial court denied plaintiff's requests for case evaluation sanctions, but awarded plaintiff $10,546.85 in costs and

[2] Such fees are awardable under the no-fault act only where the trial court concludes that the denial of insurance benefits was unreasonable. MCL 500.3148(1).

$525,126.35 in statutory interest, pursuant to MCL 600.6013. This appeal ensued.

II. ANALYSIS

This case touches on an interesting question of law and statutory interpretation: whether, when determining reasonable compensation payable under MCL 500.3107(1)(a) to lay providers of attendant care services, a jury may rely on the rates charged by health care agencies that employ licensed health care professionals who provide attendant care services. We use the words "touches on" intentionally, as this issue is not squarely before us in this appeal.

This Court has previously embraced the notion that "comparison to rates charged by institutions provides a valid method for determining whether the amount of an expense was reasonable and for placing a value on comparable services performed [by family members]." *Manley v Detroit Automobile Inter-Ins Exch*, 127 Mich App 444, 455; 339 NW2d 205 (1983); see also *Sharp v Preferred Risk Mut Ins Co*, 142 Mich App 499, 514; 370 NW2d 619 (1985). We question the conclusion reached in *Manley*.

Under MCL 500.3107, family members are entitled to reasonable compensation for the services they provide at home to an injured person in need of care. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 178-181; 318 NW2d 679 (1982); *Visconti v Detroit Automobile Inter-Ins Exch*, 90 Mich App 477; 282 NW2d 360 (1979). In determining reasonable compensation for an unlicensed person who provides health care services, a fact-finder may consider the compensation paid to licensed health care professionals who provide similar services. *Van Marter, supra* at 180-181. For this reason, consideration of the compensation paid by

health care agencies to their licensed health care employees for rendering services similar to the services provided by unlicensed family members is appropriate when determining reasonable compensation for those family members. However, the actual charges assessed by health care agencies in the business of providing such services is not relevant and provides no assistance in determining reasonable compensation for the actual provider of such services. The focus should be on the compensation provided to the person providing the services, not the charge assessed by an agency that hires health care professionals to provide such services.

Notwithstanding our questioning of *Manley,* defendant did not argue in the trial court or on appeal in this Court that *Manley* was wrongly decided.[3] Rather, the lower court record reflects that defendant only argued before the trial court that, under MCL 500.3107, Andrew's expenses had not been "incurred." The question whether attendant care services were "incurred" is distinct from the question whether the amount paid for attendant care services was reasonable. Defendant maintains that its written motion for directed verdict argued that evidence of rates charged by an agency was not relevant. However, the only document in the lower court record entitled "directed verdict" is actually a mislabeled motion for judgment notwithstanding the verdict.[4]

This Court's review is limited to the record of the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). The lower court record reveals that, at defendant's oral motion for directed

[3] Even on appeal, defendant's brief does not cite *Manley*.

[4] Even assuming that the motion for JNOV is in fact a mislabeled motion for directed verdict, that motion similarly only argues that Andrew's expenses had not been "incurred."

verdict, defense counsel argued that Andrew's expenses had not been "incurred."[5] Also, defendant did not seek to preclude, through a pretrial motion in limine, the presentation of any evidence of health care agency rates. Further, defendant did not object to the jury instructions, which quoted *Manley* and provided in pertinent part that "[c]omparison to rates charged by institutions provides a valid method for determining whether the amount of the expense was reasonable and for placing a value on comparable services." Defendant appeals only the denial of its motion for JNOV. For these reasons, our review is limited to whether the trial court properly denied defendant's motion for JNOV.[6]

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[5] Defense counsel argued before the trial court:

> Your Honor, this is a motion for partial directed verdict. In a nutshell, your Honor, what it says is, that during the course of this case there was testimony, especially yesterday, regarding rate. The rates that were presented were agency rates. Dr. Ancell, as the Court will recall, testified to this at great length, that these were rates that an agency would charge.
>
> I'm asking that those—that the jury not be allowed to consider those rates because those rates have not been incurred. As the Court knows, under the no-fault law, in order for an insurer to be liable for a benefit, the claim must have been incurred. There's been no testimony in this case that those charges have been incurred.
>
> And so I'm asking the Court to grant a motion for partial directed verdict, which would have the net effect that the jury would not be allowed to consider those rates, those agency rates, because they have not been incurred. Thank you, your Honor.

[6] Stated differently, our review is limited to the narrow question whether the jury was presented with any evidence to support the verdict, not the much broader and legally significant question whether the jury should have been precluded from hearing any evidence of the rates a health care agency could have charged defendant to retain a licensed health care provider, had Andrew not attended to plaintiff's many medical needs.

A. JNOV

This Court reviews de novo the trial court's denial of a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In doing so, we "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id*. (quotation marks and citation omitted). "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id*. "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (quotation marks and citations omitted).

MCL 500.3107(1)(a) provides:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . .

In *Van Marter, supra* at 180, this Court recognized that no-fault "benefits are payable for 'all reasonable charges' which relate to the care, recovery or rehabilitation of the injured person. The statute does not require that these services be supplied by 'trained medical personnel.' " *Id*. Further, we long ago recognized that family members should be compensated for the services they provide at home to an injured person in need of care. See *id.* at 178-181; *Visconti, supra*; see also *Reed v Citizens Ins Co of America*, 198 Mich App 443, 453; 499 NW2d 22 (1993), overruled on other grounds in *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005). Here, there is no dispute that

24-hour attendant care is necessary for plaintiff. Rather, defendant argues that this "Court should conclude that judgment notwithstanding the verdict should have been granted because the jury's verdict unavoidably was based on agency rates."

We reject defendant's argument for two reasons. First, as stated above, the jury was instructed, without objection, that "[c]omparison to rates charged by institutions provides a valid method for . . . placing a value on comparable services." Permitting this instruction to be given to the jury without objection amounts to a waiver of the issue whether the jury could base its finding of reasonable compensation on the rates health care agencies might charge for similar services. E.g., *Kohn v Ford Motor Co*, 151 Mich App 300, 310; 390 NW2d 709 (1986). A party may not waive objection to an issue and then argue on appeal that the resultant action was error. *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006); *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001).

Second, viewing the evidence in a light most favorable to plaintiff, we conclude that the jury verdict does not necessarily reflect that the jury based its award on the rates a health care agency would charge to provide services similar to those provided to plaintiff by Andrew. There was testimony that an agency would charge as much as $3,205,125 to provide the same care that plaintiff received, which after subtracting the amount that defendant had already paid Andrew, amounts to over $2.4 million in unpaid attendant care costs. The jury's verdict of $1,730,723.67 is substantially below this amount. Further, plaintiff presented evidence relating the overtime rates and shift premiums that would be paid to attendant care providers qualified to care for plaintiff. This evidence is appropriate and

independent of any evidence of the rates charged by health care agencies for attendant care services.

The only legally relevant question presented to the jury was whether the compensation defendant paid to Andrew was reasonable. The record contains sufficient evidence to conclude that the jury rejected defendant's position. Substantial evidence was introduced chronicling Andrew's everyday care of plaintiff. Not only did Andrew provide care consistent with that of a licensed health care professional, but ample evidence was presented to support the conclusion that Andrew's care was more conducive to plaintiff's care, recovery, or rehabilitation than care that could have been provided by a licensed health care professional. The evidence established that Andrew provided plaintiff care that nurses ordinarily do not provide, including treatment specific to paraplegic patients.

"[T]he trier of fact will ultimately determine whether a charge is reasonable." *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 379; 670 NW2d 569 (2003), citing *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 55; 457 NW2d 637 (1990). The litigants zealously argued their respective cases to the jury. Although the verdict itself is large, there is nonetheless evidence to support the jury's determination that the compensation provided to Andrew by defendant was not adequate, given Andrew's training received at the Craig and the actual attendant care Andrew provided to plaintiff. The evidence was sufficient for reasonable jurors to conclude that the reasonable compensation due Andrew was substantially more than the compensation paid by defendant. Thus, the jury verdict must stand.

In a related but separate issue, defendant cites MCL 500.3157, which provides:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

Defendant argues that Andrew could not "customarily" charge the hourly rate gleaned from the verdict, which it claims is $53.50. We conclude the above statute does not entitle defendant to relief.

Defendant did not raise or argue this statute in the trial court. This Court need not address issues first raised on appeal. *Booth Newspapers, Inc v University of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, plaintiff's request that Andrew be paid compensation above that offered by defendant is entirely consistent with this statute, which merely precludes a provider of health care from charging an insurance company more for services than the provider would customarily charge in a case not involving insurance. Because Andrew never provided such services in any prior case (regardless of insurance coverage), this statute cannot apply to his situation. Plaintiff's request for additional compensation payable to Andrew is limited only by the statutory requirement that such compensation be reasonable. Here, the jury determined the reasonable compensation that was due for the services provided by Andrew.

B. ATTORNEY FEES PURSUANT TO MCL 500.3148(1)

Defendant argues that the trial court clearly erred by awarding plaintiff attorney fees pursuant to MCL 500.3148(1). We agree.

"A trial court's finding of unreasonable refusal or delay will not be reversed on appeal unless it is clearly erroneous." *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994). Clear error exists when this Court is "left with a definite and firm conviction that a mistake has been made." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Clear error will be found where a trial court does not focus on the facts surrounding the disputed expenses, but instead concludes that the refusal to pay was unreasonable because the jury awarded the claimed expenses. *McCarthy, supra* at 105.

The no-fault act contains a provision allowing for an award of attorney fees. Specifically, MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

This Court has interpreted this provision of the no-fault act, holding:

> [W]hen considering whether attorney fees are warranted under the no-fault act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable. . . . [T]his Court has also explained that a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty. [*Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996), citing *McCarthy, supra* at 105.]

Defendant specifically argues that there "was, at a bare minimum, a legitimate, bona fide factual basis for [defendant's] decision to challenge plaintiff's claim." We agree.

In the written judgment, the trial court stated:

> The Court having found that the Plaintiff successfully prosecuted this claim for allowable expenses (attendant care benefits) pursuant to the Michigan No-Fault Automobile Insurance Act to a verdict of $1,730,723.67, which included a finding by the jury that benefits were more than 30 days overdue, and the court having found that Defendant Allstate Insurance Company, unreasonably refused in making the proper payment of No-Fault benefits due to Plaintiff . . . .

Notwithstanding the above-cited conclusion, our review of the record reveals no factual findings to support the conclusion reached by the trial court. It appears from the record that the trial court, when awarding attorney fees to plaintiff, only considered the jury's conclusion that Andrew was entitled to greater compensation than that offered by defendant. Thus, we are left with a definite and firm conviction that the trial court simply based its conclusion on the jury's verdict. This was error.

Moreover, we conclude as a matter of law that defendant satisfied its burden of establishing that its initial refusal to pay Andrew more than $166,000 a year plus health care benefits as compensation for the attendant care provided to plaintiff was based on a bona fide and legitimate dispute over the compensation due Andrew under the no-fault act. Neither the medical community nor the legal community has established a hard and fast rule for determining the reasonable rate of compensation due unlicensed individuals who provide necessary health care services to family members. While consideration of rates paid to licensed and trained health care providers is appropriate, the law does not require that unlicensed individuals who have not earned a degree in a pertinent health care profession be paid the same compensation paid to licensed health care professionals.

It can hardly be disputed that the greater the time a health care professional invests in his or her education and training, the greater the compensation would be for that professional. Andrew received specialized training to allow him to provide professional quality care to his son in an array of disciplines. However, Andrew's training was provided over the course of four months. Andrew did not invest years to obtain an education and specialized training to become a medical professional. Quality care made possible by the dedication and love of family members is often preferable to institutional care. Yet, this Court has recognized that family-provided accommodations are generally less costly than institutional care. *Reed*, *supra* at 452. Under these circumstances we cannot conclude that defendant acted unreasonably when it offered to compensate Andrew at the lower end of the range of what a licensed and formally educated health care professional might expect to command in the open market.

Further, we cannot conclude that the rate of compensation paid by defendant to Andrew was unreasonable, given that Andrew alone provided the 24-hour care afforded plaintiff. There is no doubt that Andrew is skilled in the care and needs of plaintiff. There is also no doubt that Andrew is a loving, devoted, and admirable father. However, it should not be overlooked that it is not possible and, in fact, it is unhealthy for an individual to provide 24-hour care to another without also caring for one's self. Out of necessity there is time in each day when Andrew is required to care for himself rather than plaintiff. Thus, in the process of arriving at a reasonable rate of compensation for Andrew, it was reasonable for defendant to elect not to factor in a shift premium for working in excess of eight hours a day.[7]

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[7] We recognize that it appears very likely that the jury rejected this position. However, the mere fact that the jury rejects a position does not, by itself, render that position unreasonable.

Finally, in determining whether defendant acted in good faith and had a legitimate question of factual uncertainty about the proper compensation payable to plaintiff for the care rendered by Andrew, we note that of the several hundred bills for plaintiff's medical care, this was the only area of dispute. Plaintiff was not denied necessary services as a result of this dispute. The evidence supports the conclusion that had Andrew ceased providing care to plaintiff, defendant would have retained and paid for all professional health care services necessary to provide for plaintiff's needs. This is not a case where defendant simply refused to pay for services. Rather, defendant paid plaintiff the amount it deemed fair and reasonable and disputed the remainder of the amount sought by plaintiff.

For these reasons, we conclude that defendant did not unreasonably delay in making proper payment to plaintiff. The portion of the judgment awarding attorney fees pursuant to MCL 500.3148(1) is reversed and the award of $274,750 in attorney fees is vacated.[8]

C. SANCTIONS PURSUANT TO MCR 2.403

On cross-appeal, plaintiff argues that the trial court erred by refusing to award plaintiff attorney fees as case evaluation sanctions pursuant to MCR 2.403, in addition to the fees awarded under the no-fault act, MCL 500.3148. This specific issue is rendered moot by our reversal of the award of attorney fees under MCL 500.3148. On remand, the trial court shall determine whether plaintiff is entitled to case evaluation sanctions pursuant to MCR 2.403. To the extent case evaluation

[8] Because we vacate the award of attorney fees, defendant's claim that the trial court abused its discretion by awarding plaintiff attorney fees at an hourly rate of $500 for 549.5 hours is rendered moot.

sanctions are appropriate, the trial court shall not rely on its prior assessment of attorney fees under MCL 500.3148.

In assessing attorney fees under the no-fault act, the trial court awarded a $500 hourly rate for four different attorneys and multiplied that rate by 549.5 hours, the number of hours plaintiff's counsel claimed were expended in litigating this matter. The trial court did not scrutinize the number of hours claimed, nor did the trial court differentiate the hourly rate of the various attorneys on the basis of their skill and experience.

Our Supreme Court recently addressed the proper method for determining an award of attorney fees under MCR 2.403. In *Smith, supra* at 530-531, the Supreme Court held that

> a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services. . . . In determining this number the court should use reliable surveys or credible evidence of the legal market. This number should be multiplied by the reasonable number of hours expended in the case . . . . The number produced by this calculation should serve as the starting point for calculating a reasonable attorney fee.

The Supreme Court added that this preliminary number may be adjusted upward or downward on the basis of the factors found in Michigan Rule of Professional Conduct 1.5(a) and *Wood v Detroit Automobile Inter-Ins Exch,* 413 Mich 573; 321 NW2d 653 (1982). This process must be employed for each attorney for whom plaintiff claims a right of fee reimbursement under MCR 2.403. On remand, to the extent the trial court finds an award under MCR 2.403 appropriate, it shall follow the formula set forth by our Supreme Court in *Smith*.

D. TWELVE PERCENT INTEREST UNDER THE NO-FAULT ACT, MCL 500.3142(3)

Plaintiff also argues on cross-appeal that the trial court erred by refusing to continue, pursuant to MCL 500.3142(3), the imposition of 12 percent penalty interest after the entry of judgment and continuing through the satisfaction of judgment. Specifically, MCL 500.3142(3) provides that "[a]n overdue payment bears simple interest at the rate of 12% per annum." Plaintiff argues that until his judgment is satisfied, his claim for benefits under the no-fault act is overdue and, thus, he is entitled to 12 percent interest. We find no merit to this claim.

Interest awardable under MCL 500.3142(3) is a substantive element of the damages suffered by plaintiff. The jury, as fact-finder, was required to determine whether plaintiff was entitled to no-fault insurance benefits and whether such benefits were overdue. If the jury determined that the benefits were overdue, then the jury was required to consider whether penalty interest under MCL 500.3142 should be awarded to plaintiff. See M Civ JI 35.04 and question 9 of the standard verdict form, M Civ JI 67.01.

Plaintiff would have this Court apply MCL 500.3142 to award plaintiff postjudgment interest in addition to interest awarded under the Revised Judicature Act (RJA), MCL 600.6013. MCL 600.6013(8) expressly entitles plaintiff to interest on the judgment (6 percent in this case) accruing from the date the complaint was filed through the date the judgment is satisfied. That interest is awarded on a judgment that includes the 12 percent interest the jury awarded as penalty interest. However, once the judgment is entered, postjudgment interest is limited to the interest rate applicable under the RJA. MCL 600.6013(8). Nothing in the no-fault act

supports the conclusion that a trial court is authorized to enhance the substantive damages determined by the jury. Rather, a trial court must enter a judgment on the jury's verdict and limit its postjudgment activity to the award of any postjudgment interest allowable under the RJA.

Review of the statutory interest provisions under the RJA supports our conclusion. MCL 600.6013 expressly provides for interest to be awarded on judgments through the date of satisfaction of judgment. By so providing, the Legislature displayed its ability and willingness to expressly provide for an award of interest after entry of a judgment. In contrast to the express mandate under the RJA, MCL 500.3142(3) is silent as it relates to the award of penalty interest after entry of the judgment.

Further, the RJA was amended several times after the enactment of Michigan's no-fault act. Some of these amendments provided for the application of different postjudgment interest rates to different types of claims. For example, the Legislature expressly provided that "if a judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed." MCL 600.6013(7). While the Legislature had the opportunity to apply a unique postjudgment interest rate to claims for personal protection insurance benefits not timely paid under the no-fault act, it did not do so.

Our conclusion is also supported by the general rule of merger of judgments. The Restatement of Judgments 2d, §18, provides in pertinent part that when a judgment is entered in favor of a plaintiff, "[t]he plaintiff

cannot thereafter maintain an action on the original claim, or any part thereof, although he may be able to maintain an action upon the judgment." Comment A to this section of the Restatement explains the notion of merger. It provides, that "[w]hen the plaintiff recovers a valid and final personal judgment, his original claim is extinguished and rights upon the judgment are substituted for it. The plaintiff's original action is said to be 'merged' in the judgment."

Applying the doctrine of merger to this case, plaintiff's claim for past due benefits was extinguished upon entry of the judgment. Thus, there no longer existed a claim that would be subject to the penalty interest provided under MCL 500.3142(3). Plaintiff's rights attach to the judgment. The only statutory interest rates applicable to a judgment are found in MCL 600.6013. As stated above, MCL 600.6013 does not specifically identify an interest rate on judgments that is unique to plaintiff's personal protection insurance benefits claim.

Plaintiff's reliance on *Johnston v Detroit Automobile Inter-Ins Exch,* 124 Mich App 212; 333 NW2d 517 (1983), although understandable, is misplaced. In *Johnston*, this Court initially addressed whether a plaintiff may recover penalty interest under MCL 500.3142 and interest upon the judgment, MCL 600.6013. In addressing the question, *Johnston* quoted this Court's opinion in *Wood v Detroit Automobile Inter-Ins Exch*, 99 Mich App 701, 709; 299 NW2d 370 (1980), in which the " '[t]rial court awarded the 12 percent interest [MCL 500.3142(3)] on the overdue wage loss payment from the time it became overdue[,] [and awarded] . . . six percent interest [MCL 600. 6013] . . . on the entire judgment from the day the complaint was filed.' " *Johnston*, *supra* at 214. The *Wood* Court addressed defendant's basic contention

that "the overlapping of the interest provisions was impermissible." This Court rejected defendant's contention and held that interest can be awarded under MCL 600.6013 even though penalty interest had been awarded under MCL 500.3142(3).

The *Johnston* Court noted that *Wood* had been affirmed by our Supreme Court, 413 Mich 573, 589-590; 321 NW2d 653 (1982), and concluded that the trial court correctly ordered both the 6 percent and the 12 percent interest. The *Johnston* Court, *supra* at 215, however, did not end its analysis, but further stated:

> Consequently, plaintiff is entitled to the following interest on his overdue no-fault personal protection benefits: interest at 12% per annum from the time his benefits became overdue on December 12, 1978, until the day before he filed the complaint, February 23, 1979, interest at 18% per annum from February 23, 1979, until June 1, 1980; and interest at 24% per annum from the entry of the judgment until the judgment is satisfied.

There is no dispute that our Supreme Court in *Wood* recognized that the interest provisions overlapped for a period. However, there is no indication by our Supreme Court in *Wood* that this overlapping period continues until the judgment is satisfied. In summarizing the trial court's decision, the Supreme Court stated that "the default judgment awarded plaintiff consisted of $11,708.93 in wage-loss benefits for *14 months and interest at 12%*." *Wood, supra* at 577 (emphasis added). The Court then stated that "[i]n addition, plaintiff received 6% interest *on the entire judgment*." *Id*. (emphasis added). Significantly, the Court identified that the 12 percent penalty interest was imposed only for 14 months, and that the 6 percent RJA interest was "on the judgment." Had the Court held the view that the 12 percent penalty interest continued until satisfaction of

judgment, the Court would not have indicated that the 12 percent penalty interest rate was assessable only for the 14-month period when benefits were overdue. The question of when penalty interest under MCL 500.3142(3) ends was simply not before our Supreme Court in *Wood*. No Michigan court has since addressed this issue. See *Shanafelt*, *supra* at 644;[9] *McMillan v Auto Club Ins Ass'n,* 195 Mich App 463; 491 NW2d 593 (1992). Thus, we conclude that *Johnston* misapplied the holding in *Wood* to extend the penalty interest rate under MCL 500.3142(3) to the satisfaction of judgment.[10]

Simply put, a court is not authorized to continue the work of a jury post verdict. Plaintiff was entitled to penalty interest as found by the jury. Plaintiff was also entitled to interest on the judgment authorized under the RJA from the filing of the complaint through satisfaction of judgment. However, MCL 500.3142(3)

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[9] Some legal commentators have cited *Shanafelt*, for the proposition that interest awardable under MCL 500.3142(3) runs from the date of the filing of the complaint to the date of the satisfaction of judgment. This notion was apparently born from Westlaw's summary headnote 10, which provides:

> No-fault insurer's wrongful refusal to pay personal protection insurance (PPI) benefits entitled insured to penalty interest and interest from date of filing of complaint to date of satisfaction of judgment, even though health insurer had paid insured's medical expenses; recovery under second, distinct contract with another legal entity was immaterial. M.C.L.A. §§ 500.3142, 600.6013.

Westlaw's summary and conclusion are wrong. Nothing in the text of the *Shanafelt* opinion supports this proposition. The question whether interest under MCL 500.3142 runs to the satisfaction of judgment was simply not addressed by the *Shanafelt* Court.

[10] Because *Johnston* was decided before November 1, 1990, we are not required to convene a conflict panel to reach this conclusion. MCR 7.215(J)(1).

does not entitle plaintiff to judicial enhancement of the substantive damages awarded by the jury.

E. ATTORNEY FEES ON APPEAL

Lastly, plaintiff seeks an award of appellate attorney fees. We conclude that plaintiff has not established a claim for appellate attorney fees under MCL 500.3148(1) or MCR 7.216(C)(1).

"[A]ttorney fees for services on appeal can be awarded under MCL 500.3148(1) . . . ." *Bloemsma v Auto Club Ins Ass'n (After Remand)*, 190 Mich App 686, 691; 476 NW2d 487 (1991). However, it is the trial court, not this Court, that considers claims for attorney fees under MCL 500.3148(1). *Id*. ("the trial court is to consider services rendered on appeal"). Accordingly, plaintiff's claim under MCL 500.3148(1) must be rejected.

Plaintiff also has not established a claim for attorney fees under MCR 7.216(C)(1). "Sanctions requested for a vexatious appeal are governed by MCR 7.216(C)(1)." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 60; 698 NW2d 900 (2005). MCR 7.216(C) provides:

> (1) The Court of Appeals may, on its own initiative or on the motion of any party filed under MCR 7.211(C)(8), assess actual and punitive damages or take other disciplinary action when it determines that an appeal or any of the proceedings in an appeal was vexatious because
>
> (a) the appeal was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal; or
>
> (b) pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety,

> violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court.
>
> (2) Damages may not exceed actual damages and expenses incurred by the opposing party because of the vexatious appeal or proceeding, including reasonable attorney fees, and punitive damages in an added amount not exceeding the actual damages. The court may remand the case to the trial court or tribunal for a determination of actual damages.

MCR 7.211(C)(8) provides:

> Vexatious Proceedings. A party's request for damages or other disciplinary action under MCR 7.216(C) must be contained in a motion filed under this rule. A request that is contained in any other pleading, including a brief filed under MCR 7.212, will not constitute a motion under this rule. A party may file a motion for damages or other disciplinary action under MCR 7.216(C) at any time within 21 days after the date of the order or opinion that disposes of the matter that is asserted to have been vexatious.

MCR 7.216(C)(1) indicates that a motion for sanctions must be filed pursuant to MCR 7.211(C)(8), and MCR 7.211(C)(8) provides that a request for sanctions must be made by motion, not in a brief. Here, plaintiff has failed to file a motion, as required by the court rule. Moreover, because defendant has prevailed in part in this appeal, we cannot conclude that defendant's appeal was vexatious.

III. CONCLUSION

We affirm the denial of the motion for JNOV. We affirm the denial of a postjudgment award of penalty interest under MCL 500.3142(3). We reverse the award of attorney fees under MCL 500.3148. We reverse the trial court's denial of a reasonable attorney fees under MCR 2.403. We vacate the award of attorney fees and

remand for a determination of reasonable attorney fees, if any, awardable under MCR 2.403 and consistent with *Smith*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

METTLER WALLOON, LLC v MELROSE TOWNSHIP

Docket No. 269051. Submitted September 11, 2007, at Lansing. Decided October 2, 2008, at 9:05 a.m. Leave to appeal denied, 483 Mich ___.

Mettler Walloon, L.L.C., brought an action in the Charlevoix Circuit Court against Melrose Township and the township's planning commission and zoning board of appeals, seeking authorization to develop certain properties within the township, which were zoned C-3 (village commercial) at all relevant times, and damages for the defendants' alleged wrongful interference with such development. Following mediation, the parties agreed to the entry of a partial consent judgment that resolved the issues regarding the development of the subject property. Following a bench trial with regard to the plaintiff's claims for damages that were based on alleged violations of 42 USC 1983, a taking without just compensation, inverse condemnation, and promissory estoppel, the court, Richard M. Pajtas, J., decided all the claims in favor of the defendants. The plaintiff appealed from the trial court's judgment and orders with regard to the damages claims.

The Court of Appeals *held*:

1. 42 USC 1983 applies to violations of the federal constitution or federal laws and does not provide a remedy for a violation of the Michigan Constitution. The trial court correctly rejected the plaintiff's count that alleged a § 1983 claim.

2. Governmental conduct must be so arbitrary and capricious as to shock the conscience in order to sustain a substantive due process claim against municipal actors. The plaintiff did not present evidence of any conduct by township officials that was so outrageous or arbitrary as to shock the conscience. The trial court did not err in rejecting the substantive due process claim.

3. The trial court did not err in using as part of its rationale in resolving the procedural due process claim in favor of the defendants the factual finding that the plaintiff failed to prove that the township's supervisor had a personal pecuniary interest in the outcome of the planning process or a motive to further a pecuniary interest.

4. The trial court did not err in determining that the plaintiff failed to show that the township supervisor's alleged improper removal of the chairman of the planning commission was a cause in fact of the planning commission's vote to reject the plaintiff's development plan. The plaintiff failed to prove the essential element of proximate cause with regard to the § 1983 claim for damages.

5. The plaintiff abandoned on appeal its inverse-condemnation claim. The trial court did not err by finding no cause of action on the temporary-taking claim in view of the plaintiff's failure to establish a basis on which error can be found.

Affirmed.

1. CONSTITUTIONAL LAW — CIVIL RIGHTS.

The all-purpose federal civil rights statute, 42 USC 1983, applies to violations of the federal constitution or federal laws and does not provide a remedy for a violation of the Michigan Constitution.

2. CONSTITUTIONAL LAW — DUE PROCESS — SUBSTANTIVE DUE PROCESS — ZONING — PROPERTY DEVELOPMENT.

A developer does not always have a protected property interest in a particular outcome of land-use planning; the rejection of development projects and refusals to issue building permits do not ordinarily implicate substantive due process even where governmental officials have violated state laws or administrative procedures; substantive due process prevents governmental power from being used for purposes of oppression, or abuse of governmental power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest.

Carson Fischer, P.L.C. (by *Robert M. Carson* and *Michelle C. Harrell*), for the plaintiff.

Daniel W. White for the defendants.

Before: MARKEY, P.J., SAAD, C.J., and WILDER, J.

WILDER, J. Plaintiff Mettler Walloon, L.L.C. (Mettler Walloon), appeals as of right the trial court's final judgment upon the remaining claims and its decision after trial. The trial court's orders decided the pertinent

issues in defendants' favor, finding no cause of action on plaintiff's damages claims.[1] We affirm.

I

The principal member of plaintiff is Louis P. Mettler (Mettler). Mettler acquired the property at issue in various parts in 2002 and 2003. Mettler acquired parcels on Walloon Lake (lakeside parcels) and parcels across the highway from the lake (dry side parcels). The lakeside parcels in question were zoned C-3 (village commercial) at all relevant times. The zoning ordinance states that the village commercial "[d]istrict is intended to provide areas for business uses that serve the township and that are located in the village area." Melrose Township Zoning Ordinance (MTZO), art IV, § 6.6(A). Numerous uses are permitted in the village commercial zone, including boathouses and wet storage, dry boat storage, marinas, and "[a]partments above all of the allowed uses[.]" MTZO, art IV, § 6.6(B).

At the time Mettler purchased the initial parcels, he had a marina permit and was considering using the lakeside parcels for the sale of antique boats. Mettler was also contemplating boathouses with living spaces above them. Mettler initially planned to develop his property as a planned unit development (PUD).

In March of 2003 plaintiff entered into a purchase agreement with the Hass brothers for the acquisition of nine additional parcels, three on the lakefront and six on the opposite side of the highway. There had been a fire on one of the Hass parcels, and some people encouraged Mettler to buy the Hass properties. After

[1] The trial concerned the damages claims. Plaintiff's claim regarding its ability to develop the subject property was resolved by a partial consent judgment.

purchasing the Hass properties, Mettler incorporated them into the site plan.

Before the purchase of the Hass properties, the plan for the lakeside parcels was to build two buildings, each in turn with two units (four total), and move an existing building across the street to be used for restoration of wooden boats. But the acquisition of the Hass properties doubled the site plan size from two buildings to four with two living units in each (eight total living units), and then one large boathouse underneath them.

Mettler initially attempted to purchase the Hass properties on land contract. It was alleged, however, that Mettler's plan subsequently began to be disfavored. Plaintiff testified at trial that at that time "there was a definite turn in the direction of the feeling . . . most definitely by Mr. [Michael] Webster," the township supervisor.

On March 28, 2003, David Drews, a project manager for Mettler, sent an e-mail to W. Randolph Frykberg, the township zoning administrator, discussing PUD issues. On March 28, 2003, Frykberg notified Webster of a meeting with Drews to discuss PUD details, but on that same date, David Drews notified Frykberg that plaintiff would not pursue a PUD, would seek approval of its development under existing zoning, and was no longer contemplating the sale of antique wooden boats.

On April 24, 2003, the Melrose Township Zoning Board of Appeals (ZBA) held a meeting. Among those present were Richard Hermann, the chairman of the planning commission and a planning commission representative on the ZBA, as well as Frykberg and township attorney Bryan Graham. Graham stated that the meeting was convened to define the term "boathouse." The ZBA acknowledged that a boathouse is a use permitted by right in the C-3 zone, and that "boat-

house" is not defined in the ordinance. The ZBA interpreted "boathouse" to mean "a building or shed, usually built partly over water, for sheltering a boat or boats, but which excludes any residential use."

On April 29, 2003, Webster removed Hermann from his position on the planning commission. On May 2, 2003, Mettler submitted a site plan for the lakeside parcels. The plan proposed marina and boathouse uses. The township directed the site plan to Graham for review. On May 23, 2003, Graham sent a letter to plaintiff indicating deficiencies in the site plan.

On June 20, 2003, Webster sent an e-mail to Frykberg, with copies to various township officials, stating:

> I want to reiterate the importance of having the amendments completed prior to continuing with any receipt of application or review of the Mettler project or any large scale project. These types of projects must meet the amended standards, particularly the "performance guarantee" amendment to protect the interest of the community.
>
> I realize that delays will frustrate Mr. Mettler and others, but if the policy has been "no condominiums allowed on the waterfront in the Village" then that is the policy we must follow until zoning is clarified or changed. I have made it clear that condominiums under the guise of boathouses was [sic] not appropriate and that there would be public discontent, but some people just did not want to listen. I continue to get negative comments and letters in regard to the condo/boathouses.
>
> I feel that the priority of the Township Board is to remedy any misunderstandings as to zoning interpretations before proceeding with any large scale projects such as Mettler's. Allowing the Zoning Board of Appeals and the Planning Commission to clearly define the interest of the township will take the onus of such a momentous decision off of a single individual and place it on several people.
>
> In the long run, having taken deliberate steps to clarify and improve our zoning ordinance will be best for the

> community. To expedite matters in the interest of a developer is shortsighted and is a recipe for disaster. I expect that you will act accordingly.

At a June 23, 2003, planning commission meeting, Graham recommended zoning ordinance amendments. Thomas Swenor, the newly elected chairman of the planning commission, announced a special meeting would be held on July 17, 2003, to conduct a public hearing on the proposed amendments. Hermann, who was present, questioned the need for a special meeting, but Frykberg explained that he was expecting a lengthy site plan review at the next regular meeting and that the amendments should be considered first. Also at the June 23, 2003, planning commission meeting, it was announced that the commission would consider amending the zoning ordinance to add the word "commercial" in front of "boat houses" in the C-3 zone, and that a public hearing would be held at the July 17 special meeting to consider doing so.

On July 17, 2003, the planning commission held a special meeting, considered zoning ordinance amendments, and conducted a public hearing. The commission considered the proposed amendment to add "commercial" before "boathouses and wet storage" in the C-3 zone. Swenor explained the purpose of the amendment, but commission member Wayne Ramsey suggested that the amendment was unnecessary because the ordinance already designates C-3 as a commercial zone. Frykberg indicated that questions and ambiguity were what prompted the proposal, and that it was requested by the township board. He agreed that the purpose and intent of the zoning ordinance would be unchanged, but stated that it was being proposed in the interest of clarity. The commission unanimously passed a motion to recommend acceptance of the amendment to add "commer-

cial" in front of the phrase "boat houses and wet storage" that are allowed uses in a C-3 zone.

On July 21, 2003, the ZBA met. Chairman Errol Lee stated that the meeting was a continuation of the earlier meeting regarding interpretation of the zoning ordinance provisions, as requested by the township board. A motion was filed, based on findings of fact, to rule that a boathouse must be commercial to be allowed in a C-1 or C-3 zone. The motion passed.

On July 18, 2003, Mettler's development plan became available for public view at the library. On July 28, 2003, the planning commission held a regular meeting. The commission first dealt with the unfinished business of reviewing Mettler's preliminary development plan. The meeting had to be moved to the fire hall to accommodate the additional persons who wanted to attend. There was substantial public discussion about whether Mettler's proposed development was an allowed use in a C-3 zone. There was concern that the duplex concept would result in the boathouses below being sold or leased on a long-term basis to the upstairs occupant, effectively eliminating any semblance of a commercial enterprise. When asked for his definition of a "commercial" use of the proposed buildings, John Turner, plaintiff's counsel, repeatedly responded that the terms and conditions of access would be determined by the owner. Following the close of the public hearing portion of the July 28, 2003, meeting, the commission deliberated, but was not prepared to decide whether the proposed project was commercial in nature and adjourned the issue to a meeting on August 1, 2003.

On July 30, 2003, Frykberg provided a memorandum to the planning commission, for purposes of the August 1, 2003, meeting. Frykberg noted that the site plan included two garages on the street side of the first floor

and two boathouses on the lakeside of the first floor in each of the four buildings. Frykberg opined that the proposed use of the garages and boathouses "is not, to me, a commercial use." Frykberg opined that the proposed use of the garages and boathouses "does not, to me, meet the purpose of the C-3 Village Commercial" zone, viz., to provide areas for business uses. Frykberg recommended denial of the site plan:

> Because the proposed use of the property for garages and boathouse[s] does not meet the common or standard utilization of the word commercial, nor does it meet the intent of the C-3 Village Commercial district, *I recommend that the Planning Commission deny the Site Plan* review as presented. This is not to say that the project, with some modifications, or a re-submittal as a PUD, could not be approved, just that the present form of the application does not meet the Ordinance. [Emphasis added.]

On August 1, 2003, the planning commission reconvened. Graham referenced exhibits made available to members, including two sets of proposed findings of fact. The two sets of proposed findings of fact were called "option one" and "option two." The proposed findings of fact for option one supported a decision not to approve the plan, while the findings of fact for option two supported a decision to permit the use and allow the review process to proceed to the next step (actual site plan review). The commission ultimately adopted the findings of fact in option one.

Number 15 of the findings of fact for option one states in relevant part: "the Planning Commission finds that the long-term rental of a boathouse in close proximity to the apartment unit is the functional equivalent of the person owning both the apartment condominium unit and the boathouse condominium unit." The commission found that merely labeling the boathouses as commercial uses does not *ipso facto* make them com-

mercial, and "[b]ased on all of the information before it, the Planning Commission [found] that the proposed boathouses are not commercial in nature." The commission found that the ordinance "does not permit a residential use as the princip[al] use of property within the C-3 zoning district." Therefore, the commission found "that the applicant's proposed development is not a use allowed by right in the C-3 zoning district."

After the proposed findings of fact for both options were read, Ramsey opined that "the currently proposed plan does not meet the definition of a commercial use." Planning commission member William Stetson essentially agreed, because "rentals could vary in length and the condo owners may have first choice at a long-term rental."

Ramsey moved, seconded by planning commission member Al Reeves, that on the basis of the findings of fact, the development plan as a use by right in the C-3 zone be denied. After the motion, additional discussion by members occurred. Ramsey encouraged Mettler to work with Frykberg to alter the plan to provide an acceptable proposal. He indicated that a PUD proposal should be explored. Swenor expressed support for the mixed-use PUD idea. Swenor and Graham noted that the option to apply as a PUD is the applicant's choice and the township cannot force it to do so. The commission unanimously passed a motion to deny the development plan.

On September 2, 2003, Mettler filed with the ZBA an appeal of the planning commission's rejection of the development plan. On September 23, 2003, Graham prepared a memorandum noting that the scope of the ZBA's authority (in considering Mettler's appeal from the planning commission's denial) is limited to considering the evidence presented to the planning commission.

On October 8, 2003, the ZBA met to consider Mettler's appeal. Chairman Lee stated that the ZBA was to

review the procedures that the planning commission used to deny the site plan. Graham added that the ZBA should look at the planning commission's findings of fact to determine if the decision was correct, i.e., was the decision supported by the findings of fact. Frykberg stated that the available documentation was the same as what had been available to the planning commission.

Turner gave a lengthy presentation. Turner argued that Webster removed Hermann from the planning commission because Webster thought that Hermann did not share the vision of the township. Turner argued that this was done to slow down consideration of the application. Turner disagreed with Graham's memorandum about the ZBA's review being limited to the evidence that was available to the planning commission. Turner argued that Graham could not "establish the rules at the beginning of a meeting," and that the ZBA should establish the rules, not the township's attorney. Turner argued that there were no findings of fact allowed at the second commission meeting, no policy was set ahead of time, no public comment was allowed, and that due process is fundamental. Turner argued that the site plan was not subjected to the same procedures as other site plans.

Members of the public made various comments. After the public hearing closed, the ZBA deliberated on the appeal, considering the findings of fact made by the planning commission. The ZBA affirmed findings of fact 1 through 13, but made no decision on findings of fact 14 and 15, determining "[t]his needs more work." The minutes state that "[m]uch discussion followed on the long and short-term rental issue and Mr. Turner stated he felt there is no real evidence to substantiate the short term vs. long-term rentals as far as commercial use is concerned." The ZBA adjourned to its October 30, 2003, meeting.

On October 30, 2003, the ZBA met. The ZBA discussed and agreed unanimously to only deliberate on whether the planning commission decision was made properly and to not rehear the entire planning commission case. The ZBA made 29 findings, including finding that the planning commission's conclusion that the proposed development was not commercial in nature was proper. Accordingly, the ZBA affirmed the planning commission's decision. Chairman Lee noted that the applicant had the option of submitting new plans to the planning commission.

Plaintiff then commenced this action, seeking damages as well as authorization to develop the property. Facilitative mediation resulted in a partial consent judgment, allowing development to proceed under a revised development plan containing new commercial elements. The consent judgment requires that the boathouses be available for rent to the general public, and be rented for periods not longer than two years. The marina's commercial space (4,000 square feet) is required to be maintained as commercial in perpetuity. But the partial consent judgment did not resolve plaintiff's damages claims.

Defendants filed a dispositive motion concerning the remaining damages claims. The trial court denied it. The parties then participated in a bench trial regarding the damages claims. The trial court eventually held that there was no cause of action.

II

A

First, plaintiff argues that the trial court applied an incorrect legal standard to its claim under 42 USC 1983

when it stated that plaintiff failed to prove that township officials had a pecuniary interest behind their decisions. We disagree.

1

Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007) (a taking claim), citing *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n,* 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous if panel members are left with a definite and firm conviction that a mistake has been made. *American Federation of State, Co & Muni Employees v Bank One, NA,* 267 Mich App 281, 283; 705 NW2d 355 (2005).

2

a

42 USC 1983 is the all-purpose federal civil rights statute, providing a remedy for violations of the federal constitution and other federal law. A plaintiff must demonstrate that the defendants, acting under color of state law, deprived it of a right secured by the constitution or the laws of the United States. *American Manufacturers Mut Ins Co v Sullivan,* 526 US 40, 49-50; 119 S Ct 977; 143 L Ed 2d 130 (1999). In other words: "Any person who, under color of state law, deprives another of rights protected by the constitution or laws of the United States, is liable under 42 USC 1983." *Morden v Grand Traverse Co*, 275 Mich App 325, 332; 738 NW2d 278 (2007), citing *Monell v Dep't of Social Services of the City of New York,* 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"[I]n any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *Co of Sacramento v Lewis,* 523 US 833, 841 n 5; 118 S Ct 1708; 140 L Ed 2d 1043 (1998). There must be an underlying violation of the federal constitution or a federal law, in order for a § 1983 claim to lie. *Manuel v Gill*, 270 Mich App 355, 374-375; 716 NW2d 291 (2006). Here, plaintiff's § 1983 count (count IV) asserts that defendants "deprived Plaintiff of its constitutionally protected rights to substantive due process and to the reasonable use and enjoyment of its property, as protected by the Michigan and United States Constitutions."

Section 1983 does not provide a remedy for a violation of the Michigan Constitution; rather, there must be an underlying violation of the federal constitution or *federal* law. *Morden, supra* at 332. "By the terms of the statute itself, a section 1983 claim must be based upon a *federal* right." *Ahern v O'Donnell,* 109 F3d 809, 815 (CA 1, 1997) (emphasis in original). Therefore, plaintiff's count IV, insofar as it asserts a § 1983 claim for violation of the Michigan Constitution, was correctly rejected.

Count IV expressly states a substantive due process claim, but does not expressly state a procedural due process claim. However, the trial court and defendants essentially consented to the trial of both a substantive due

process claim (pleaded) and a procedural due process claim (unpleaded). We therefore address both claims.

b

We first consider the substantive due process claim. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. But despite the clause's reference to process, the United States Supreme Court has interpreted this clause to "guarantee[ ] more than fair process," *Washington v Glucksberg,* 521 US 702, 719; 117 S Ct 2258; 138 L Ed 2d 772 (1997), and to cover a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Co of Sacramento, supra* at 840 (quotation marks and citation omitted).

In disputes over municipal actions, the focus is on whether there was egregious or arbitrary governmental conduct. In *City of Cuyahoga Falls, Ohio v Buckeye Community Hope Foundation*, 538 US 188, 198-199; 123 S Ct 1389; 155 L Ed 2d 349 (2003), the Court stated:

> [T]he city engineer's refusal to issue the [building] permits while the petition [for repeal of a municipal housing ordinance authorizing construction of the low-income housing complex at issue] was pending in no sense constituted egregious or arbitrary government conduct. See *County of Sacramento v. Lewis,* 523 U.S. 833, 846 [118 S Ct 1708; 140 L Ed 2d 1043] (1998) (noting that in our evaluations of "abusive executive action," we have held that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' ").

Thus, when evaluating municipal conduct vis-à-vis a substantive due process claim, only the most egregious official conduct can be said to be arbitrary in the constitutional sense.

To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience. In *Co of Sacramento*, the parents of a motorcycle rider killed in a high-speed police chase of the motorcycle brought a § 1983 claim against the county, the sheriff's department, and a deputy, alleging deprivation of the rider's life without substantive due process. The Supreme Court applied a "shocks the conscience" standard and held that the Court of Appeals erred in reversing the district court's summary judgment in the deputy's favor. The Supreme Court's discussion is worth quoting at length:

> We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell,* 418 U.S. 539, 558 [94 S Ct 2963; 41 L Ed 2d 935] (1974), whether the fault lies in a denial of fundamental procedural fairness, see, *e.g., Fuentes v. Shevin,* 407 U.S. 67, 82 [92 S Ct 1983; 32 L Ed 2d 556] (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g., Daniels v. Williams,* 474 U.S. [327, 331; 106 S Ct 662; 88 L Ed 2d 662 (1986)] (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, *e.g., Griswold v. Connecticut,* 381 U.S. 479 [85 S Ct 1678; 14 L Ed 2d 510] (1965), and its executive capacities, see, *e.g., Rochin v. California,* 342 U.S. 165 [72 S Ct 205; 96 L Ed 183] (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.
>
> Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional

sense," *Collins v. Harker Heights,* 503 U.S. [115, 129, 112 S Ct 1061; 117 L Ed 2d 261 (1992)], thereby recognizing the point made in different circumstances by Chief Justice Marshall, " 'that it is *a constitution* we are expounding,' " *Daniels v. Williams, supra,* at 332 (quoting *McCulloch v. Maryland,* [17 US 316, 407] 4 Wheat. 316, 407 [4 L Ed 579] (1819) (emphasis in original)). Thus, in *Collins v. Harker Heights,* for example, we said that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression." ' " 503 U.S., at 126 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. [189, 196; 109 S Ct 998; 103 L Ed 2d 249 (1989)] in turn quoting *Davidson v. Cannon,* 474 U.S. [344, 348; 106 S Ct 668; 88 L Ed 2d 677 (1986)]).

To this end, for half a century now *we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience*. We first put the test this way in *Rochin v. California, supra,* at 172-173, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening years we have repeatedly adhered to *Rochin*'s benchmark. See, *e.g., Breithaupt v. Abram,* 352 U.S. 432, 435 [77 S Ct 408; 1 L Ed 2d 448] (1957) (reiterating that conduct that " 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process); *Whitley v. Albers,* 475 U.S. 312, 327 [106 S Ct 1078; 89 L Ed 2d 251] (1986) (same); *United States v. Salerno,* 481 U.S. 739, 746 [107 S Ct 2095; 95 L Ed 2d 697] (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty' ") (quoting *Rochin v. California, supra,* at 172, and *Palko v. Connecticut,* 302 U.S. 319, 325-326 [58 S Ct 149; 82 L Ed 288] (1937)). Most recently, in *Collins v. Harker Heights, supra,* at 128, we said again that *the substantive component of the Due Process Clause is violated by executive action only when it "can properly be*

> *characterized as arbitrary, or conscience shocking, in a constitutional sense*." While the measure of what is conscience-shocking is no calibrated yard stick, it does, as Judge Friendly put it, "point the way." *Johnson v. Glick,* 481 F.2d 1028, 1033 (CA2), cert. denied, 414 U.S. 1033 (1973). [*Co of Sacramento, supra* at 845-847 (emphases added).]

Thus, when executive action is challenged in a substantive due process claim, the claimant must show that the action was so arbitrary (in the constitutional sense) as to shock the conscience.

In *Butler v Detroit*, 149 Mich App 708, 721-722; 386 NW2d 645 (1986), the plaintiff's decedent died in a fatal shooting involving the police, and, in addition to state-law tort claims, the plaintiff brought a § 1983 claim for deprivation of life without substantive due process. The jury found in the plaintiff's favor on all counts and awarded compensatory and punitive damages on the § 1983 claim. This Court held that the plaintiff failed to adequately prove a substantive due process violation under the "shocks the conscience" test:

> [W]e must then inquire whether plaintiff "proved a case which fits the other prong of substantive due process—official acts which 'may not take place no matter what procedural protections accompany them' ". *Wilson v Beebe,* 770 F2d [578] 586 [(CA 6, 1985)]. As explained by the *Wilson* court, there "is a substantive due process right akin to the 'fundamental fairness' concept of procedural due process". *Id. Applying the "shocks the conscience test" as described in Wilson v Beebe, supra, to the facts and evidence presented in this case, we find that the plaintiff had failed to establish a cause of action under 42 USC 1983. The complained-of official conduct does not "shock the conscience" of this Court* nor does it "offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with

> the most heinous crimes". *Wilson v Beebe,* 770 F2d 586. [*Butler, supra* at 721-722 (emphasis added).]

Thus, the shocks-the-conscience test has been applied in Michigan to a substantive due process claim. Michigan courts have acknowledged that the essence of a substantive due process claim is the *arbitrary* deprivation of liberty or property interests. *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 176; 667 NW2d 93 (2003).

Sundry decisions, both federal and state, including those involving land use planning, apply the shocks-the-conscience standard. In *Mongeau v City of Marlborough*, 492 F3d 14 (CA 1, 2007), a developer claimed a deprivation of property without substantive due process. Eugene Mongeau alleged that Stephen Reid, the city's commissioner of inspectional services, denied him a building permit and interfered in the zoning process for improper reasons. *Id*. at 16. The court held that the shocks-the-conscience standard applied to the substantive due process claim, and that the city official's conduct in opposing the developer's building permit did not shock the conscience. The court stated:

> If Mongeau believes that the City or Reid has wrongly charged or demanded too much for his building permit, he may find recourse in other laws, but not in the substantive component of the Due Process Clause of the Fourteenth Amendment. Such conduct, without more, cannot be said to transgress "some basic and fundamental principle . . . [such] that 'the constitutional line has been crossed' " and our conscience is shocked. [*Id*. at 20 (citation omitted).]

In *Mitchell v McNeil*, 487 F3d 374, 377 (CA 6, 2007), the court stated:

> To state a cognizable substantive due process claim, the plaintiff must allege "conduct intended to injure in some way unjustifiable by any government interest" and that is

> "conscience-shocking" in nature. *Lewis,* 523 U.S. at 849, 118 S.Ct. 1708; *see Stemler v. City of Florence,* 126 F.3d 856, 869 (6th Cir. 1997); *Lewellen v. Metro. Gov't of Nashville & Davidson County,* 34 F.3d 345, 350-51 (6th Cir. 1994).

Mitchell held that the defendants' municipal policy of allowing police officers to loan their personal vehicles to informants did not deprive the plaintiffs of liberty without substantive due process. *Id*. at 377-378.

In *Torromeo v Town of Fremont, New Hampshire*, 438 F3d 113 (CA 1, 2006), the court held that the town's unjustified delay in issuing previously approved building permits after enacting a growth control ordinance did not shock the conscience, and thus did not deprive the plaintiff of property without substantive due process, even though the town did not follow procedures mandated by state law in enacting the ordinance. *Torromeo* is worth quoting at length:

> . . . We recently explained the limits on substantive due process claims arising from land-use disputes:
>
> "This Court has repeatedly held that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents governmental power from being used for purposes of oppression, *or abuse of government power that shocks the conscience*, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest. Although we have the left door [sic] slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of government power is a high one indeed."

> *SFW Arecibo Ltd. v. Rodríguez,* 415 F.3d 135, 141 (1st Cir. 2005) (internal citations omitted).
>
> In *Arecibo,* real estate developers sued after a state planning board incorrectly determined that their building permit had expired. *Id.* at 137. When suit was filed, the state court had already determined that the permit had been wrongly revoked. *Id.* at 138. We affirmed the dismissal of the substantive due process claim because the complaint stated "[i]n its strongest form . . . that the [p]lanning board made an erroneous decision in violation of state law," which is insufficient to establish a substantive due process violation. *Id.* at 141. So too here. Plaintiffs allege that the Town violated substantive due process by enacting the growth control ordinance without following the procedures mandated by New Hampshire law. But, as in *Arecibo,* the claim is only that the Town's violation of state law caused Plaintiffs harm. This is not enough. *See id.* at 141; *see also Licari v. Ferruzzi,* 22 F.3d 344, 349 (1st Cir. 1994) (affirming dismissal of substantive due process claim based on allegations that a town planning board improperly revoked the developer's building permits and delayed processing and approval of an application for an amended permit); *PFZ Properties, Inc. v. Rodríguez,* 928 F.2d 28, 32 (1st Cir. 1991) (affirming dismissal of substantive due process claim where developer alleged that government agency failed to comply with agency regulations or practices in the review and approval process of construction plans). [*Torromeo, supra* at 118 (emphasis added).]

Thus, under federal law, even a violation of state law in the land use planning process does not amount to a federal substantive due process violation.

In *Koscielski v City of Minneapolis*, 435 F3d 898 (CA 8, 2006), the court held that the plaintiffs, operators of a firearms dealership, failed to show that a city zoning ordinance restricting where firearms dealerships could operate was so irrational and egregious as to shock the conscience, so as to violate their substantive due pro-

cess rights, where there were vacant lots meeting the requirements of the zoning ordinance. The court stated:

> Due process claims involving local land use decisions must demonstrate the "government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law." *Anderson v. Douglas County,* 4 F.3d 574, 577 (8th Cir. 1993) (internal quotation omitted). *The action must therefore be so egregious or extraordinary as to shock the conscience*. *See County of Sacramento v. Lewis,* 523 U.S. 833, 846-47, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Burton v. Richmond,* 370 F.3d 723, 729 (8th Cir. 2004). [*Koscielski, supra* at 902 (emphasis added).]

In *United Artists Theatre Circuit, Inc v Twp of Warrington, PA*, 316 F3d 392 (CA 3, 2003), Judge (now Justice) Samuel A. Alito held that the proper standard for evaluating the substantive due process claim was whether the supervisors' actions (allegedly delaying approval of a proposed theater development so that the township could obtain an impact fee offered by a competing developer) shocked the conscience.

In *Co Concrete Corp v Roxbury Twp,* 442 F3d 159, 170 (CA 3, 2006), the plaintiffs argued that the township impeded their efforts to expand their sand and gravel extraction business "through false accusations, verbal disparagement and the imposition of illegal conditions and restrictions on their business in violation [of] a 1993 agreement." It was allegedly "[o]n the heels" of this animus between the appellants and the township that the township enacted an ordinance rezoning the plaintiffs' land from industrial to rural residential or open space. *Id*. The plaintiffs alleged that the only motivation for enacting an ordinance was to rezone the plaintiffs' property, constituting an improper use of the zoning authority. The land had been zoned industrial for almost 50 years, and the rezoning action was alleged

to have been taken with the knowledge that it would violate the plaintiffs' legal and contractual rights, and with the desire to prevent the plaintiffs from operating their business. *Id*. The United States Court of Appeals for the Third Circuit concluded that the plaintiffs had sufficiently *alleged* a claim of substantive due process violations, providing that they " 'had the right to be free from harassment in [its] land development efforts.' " *Id*. (citation omitted). However, *Co Concrete Corp* relied on *Blanche Road Corp v Bensalem Twp*, 57 F3d 253, 258 (CA 3, 1995), which applied a lower standard than the "shocks the conscience" test and was abrogated on that ground. *United Artists Theatre Circuit, Inc, supra* at 400 (holding that *Blanche Road Corp* applied the "improper motive" test and, therefore, could not be reconciled with the "shock the conscience" test applied in *Lewis, supra* at 847).

In *Uhlrig v Harder*, 64 F3d 567, 573 (CA 10, 1995), the panel noted that "the standard for judging a substantive due process claim is whether the challenged government action would shock the conscience of . . . judges." (Quotation marks and citations omitted.) The panel further stated:

> [T]o satisfy the "shock the conscience" standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. The level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct. We do know, however, that the "shock the conscience" standard requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than

> an ordinary tort . . . . [*Id.* at 574, citing *Collins v City of Harker Hts, Texas*, 503 US 115, 128; 112 S Ct 1061; 117 L Ed 2d 261 (1992).]

"The Due Process Clause 'is not a guarantee against incorrect or ill-advised [governmental] decisions.' " *Collins, supra* at 129 (citation omitted).[2]

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[2] It is also worth noting that even a violation of state law relating to land use planning (such as a supervisor's discharging a planning commission member without approval from the township board of trustees) does not necessarily constitute a substantive due process violation. In *Eichenlaub v Indiana Twp*, 385 F3d 274 (CA 3, 2004), the plaintiffs asserted that zoning officials refused certain permits and approvals and applied unnecessary enforcement actions and subdivision requirements to the plaintiffs' property that were not applied to other parcels. The plaintiffs alleged that "zoning officials applied subdivision requirements to their property that were not applied to other parcels; that they pursued unannounced and unnecessary inspection and enforcement actions; that they delayed certain permits and approvals; that they improperly increased tax assessments; and that they maligned and muzzled the Eichenlaubs." *Id*. at 286. The panel noted that such complaints were "examples of the kind of disagreement that is frequent in planning disputes." *Id*. The panel distinguished a zoning dispute with the kind of gross misconduct that would shock the conscience as cases involving claims of unconstitutional taking without just compensation or an improper seizure in violation of the Fourth Amendment. *Id*. at 285, citing *Conroe Creosoting Co v Montgomery Co*, 249 F3d 337, 340 (CA 5, 2001) (allegation that "officials fraudulently converted a tax levy for a $75,000 deficiency into an unauthorized seizure and forced sale and destruction of an $800,000 ongoing business").

In *Eichenlaub*, Judge Michael Chertoff wrote: "[E]very appeal by a disappointed developer from an adverse ruling of the local planning board involves some claim of abuse of legal authority, but it is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983." *Eichenlaub*, *supra* at 286, quoting *United Artist Theatre Circuit, Inc*, *supra* at 402, quoting *Creative Environments, Inc*, 680 F 2d 822, 833 (CA 1, 1982) (internal quotation marks omitted).

In *PFZ Properties, Inc v Rodriguez*, 928 F2d 28, 32 (CA 1, 1991), the United States Court of Appeals for the First Circuit rejected a substantive due process claim arising from land use planning, after construction

There are decisions from sister states applying the "shocks the conscience" test to land use planning disputes. In *Plemmons v Blue Chip Ins Services, Inc*, 387 NJ Super 551; 904 A2d 825 (2006), the court held that actions by Shirley Himmelman, the chairperson of the borough of Audubon's zoning and planning board, and by the borough secretary that delayed the plain-

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plans for a residential and tourist project in Puerto Rico were denied. The court stated:

> This Court has repeatedly held . . . that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.' " [*Id*. at 31-32 (citations omitted).]

The panel further reasoned:

> [W]e hold that PFZ's allegations that ARPE [Regulations and Permits Authority of the Commonwealth of Puerto Rico] officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution. *See Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990) (noting that "*even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process*"), *cert. denied*, [498] U.S. [1041], 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacia Talega project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label. [Emphasis added.]

tiff's (a property owner's) efforts to convert property from residential to commercial uses did not constitute "egregious official conduct" that "shocked the conscience," *id.* at 569, and thus the plaintiff did not have a substantive due process claim under § 1983 against such officials for damages that occurred to the property as a result of a storm and construction delays. Himmelman had only notified Robert Scouler, the borough inspector, that the owner was apparently engaged in unlawful construction work. There was no evidence that the board's delay in approving the site plan departed from its general practice, or that the owner demanded timely issuance of a resolution memorializing the site plan approval. When Claire Remenicky, Scouler's secretary, failed to provide the owner with a new construction permit application, she was only complying with Scouler's directions, and there was no evidence that Remenicky was aware that Scouler was pursuing some nefarious objective. The appellate court affirmed the trial court's summary judgment for the municipal defendants (the borough, Himmelman, and Remenicky). *Plemmons* acknowledged that "[t]he [federal] Courts of Appeals have routinely utilized the "shocks the conscience" test in reviewing claims that the actions of officials responsible for passing upon land use and other related applications were so egregiously arbitrary that they violated a property owner's substantive due process rights." *Plemmons, supra* at 568.

It is worth noting that a developer does not always have a protected property interest in a particular outcome of land use planning.[3] As indicated in *Aegis of*

[3] *RRI Realty Corp v Incorporated Village of Southampton*, 870 F2d 911 (CA 2, 1989) (the developer did not have a property interest protected by substantive due process in a building permit for the second stage of its mansion renovation project, because the local regulating body had discretion to deny such a permit).

Arizona, LLC v The Town of Marana, 206 Ariz 557, 568-569; 81 P3d 1016 (Ariz App, 2003), there must be a reasonable expectation of entitlement:

> "A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56, 62 (9th Cir. 1994). "A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from 'existing rules or understandings that stem from an independent source such as state law.' " *Id., quoting Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972).
>
> Again, because only Marana's final decision denying the CUP [conditional use permit] application was subject to review in connection with Aegis's substantive due process claim, it is clear that Aegis could not have had a "reasonable expectation of entitlement" to have the CUP application granted. Although [Joel] Shapiro [Marana's then-acting planning director] supported the CUP application and recommended its approval, no evidence in the record shows that anyone on either the Planning and Zoning Commission or town council had told Aegis that the CUP application would be approved. Thus, once the application for the CUP was submitted, Aegis was subject to the inherently unpredictable and often politicized process of seeking permission from a local legislative body to conduct certain activity on a piece of property. In short, Aegis had no protected property interest in having its CUP application granted.

Aegis of Arizona, LLC, *supra* at 569, next considered the substantive due process claim under the "shocks the conscience" standard:

> Moreover, even if we assume, arguendo, that Aegis did have a protectable interest in the granting of the CUP, its substantive due process claim still fails. After determining that a party has a protectable property interest, the issue becomes, in the context of a § 1983 suit, whether any depri-

> vation of that interest resulted from an abuse of governmental power of sufficient degree to be deemed a constitutional violation. *See Greenbriar, Ltd. v. City of Alabaster,* 881 F.2d 1570, 1577 (11th Cir. 1989). In order to show a substantive due process violation, the abuse of governmental power must be one that "shocks the conscience." *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 401 (3rd Cir. 2003) (holding that in the land-use context, substantive due process is violated only when government action "shocks the conscience"); *cf. County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (in context of search and seizure, substantive due process is violated only when the government's action shocks the conscience in a constitutional sense); *Eller Media Co. v. City of Tucson,* 198 Ariz. 127, ¶ 6, 7 P.3d 136, ¶ 6 (App. 2000) ([in case in which billboard company sought to enjoin city from enforcing outdoor lighting code prohibition against bottom-mounted illumination of billboards, alleging a valid nonconforming use and substantive due process violation] noting that substantive due process "precludes government conduct that shocks the conscience"); *Martin v. Reinstein,* 195 Ariz. 293, ¶ 66, 987 P.2d 779, ¶ 66 (App. 1999) (applying "shocks the conscience" standard in context of substantive due process claim challenging application of Sexually Violent Persons Act).

Aegis of Arizona, LLC, held that the trial court did not err in denying the plaintiff's motion for judgment as a matter of law.

California also applies the "shocks the conscience" standard. In *Clark v City of Hermosa Beach*, 48 Cal App 4th 1152, 1186; 56 Cal Rptr 2d 223 (1996), the court concluded that the developer did not have a protected property interest in the development project permits in question. The court also held that the city's action in allowing a particular council member with a conflict of interest to participate was not irrational or conscience-shocking:

> In this case, regardless of whether the City Council's decision was proper under state law, we cannot say that its conduct, for due process purposes, was arbitrary or oppressive or that it "shocks the conscience." Although we have concluded that Councilmember [Robert] Benz had a conflict of interest in voting on the project, the city attorney advised the Council at the public hearing that there was no conflict. That advice was incorrect, but it was not irrational. In light of the city attorney's opinion, the Council did not act irrationally by allowing Benz to participate in the proceedings. [*Id*. at 1186.]

Clark further held: "the Council erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it *may have* misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the Council's ultimate decision to deny the permits did not lack a rational basis." *Id*.

Massachusetts is deferential toward local land use planning bodies. In *K Hovnanian at Taunton, Inc v City of Taunton*, 37 Mass App Ct 639, 647; 642 NE2d 1044 (1994), the court stated:

> Had Hovnanian asserted a specific property interest under State law, any arbitrary misapplication of that law reflected by the denial of the tie-in nevertheless does not involve procedural or substantive due process rights. *Rosenfeld v. Board of Health of Chilmark* [27 Mass App Ct 621, 627-628; 541 NE2d 375 (1989)]. "[T]he ordinary state administrative proceeding involving land use or zoning does not present [a violation of a Federal constitutional right], regardless of how disappointed the license or privilege seeker may feel at being . . . turned down." *Id*. at 628, 541 N.E.2d 375, quoting from *Creative Envts*. . . . See Bobrowski, Handbook of Massachusetts Land Use & Planning Law § 2.6.1 at 77 (1993 & Supp. 1994) ("The *Creative Environments* holding has led, in the First Circuit, to a long line of land use decisions rejecting the use of § 1983 actions."[)] Moreover, we are not involved here with cor-

> rupt or egregious conduct that so shocks the conscience as to give rise to a due process claim. See *Raskiewicz v. Town of New Boston,* 754 F.2d 38, 44 (1st Cir. [1985]), cert. denied . . . . *Rosenfeld v. Board of Health of Chilmark* [27 Mass App Ct 621, 628; 541 NE2d 375 (1989)].

K Hovnanian at Taunton, Inc, supra at 648, also noted that the developer had no constitutionally protected property interest in the approval of a subdivision plan:

> Hovnanian's claim of a right to approval of its subdivision plan is similarly unavailing. This court held in *K. Hovnanian at Taunton, Inc. v. Planning Bd. of Taunton,* 32 Mass.App.Ct. [480] 485-486, 590 N.E.2d 1172 [1992], that the decision of the Taunton planning board to reject Hovnanian's subdivision plan was correct given the failure of the plan to comply with the board's regulations and the absence of approval by the Taunton board of health based upon the unavailability of a sewer tie-in. It is significant that with respect to the absence of the Taunton board of health approval, this court, in effect, indicated that administrative discretion was not involved. We concluded that "the planning board had no choice but to disapprove the plans (plans. . . .") *Id.* at 486, 590 N.E.2d 1172. In any event, no "property" interest is involved in the approval of a subdivision plan. *Cote v. Seaman,* 625 F.2d 1, 2 (1st Cir. 1980). *Rosenfeld v. Board of Health of Chilmark, supra* 27 Mass.App.Ct. at 627, 541 N.E.2d 375 [1989]. The existence of such an interest is "a necessary prerequisite to a fourteenth amendment due process claim." *Cote v. Seaman, supra* at 2.[4]

Pennsylvania also gives deference to local planning officials. In *Anselma Station, Ltd v Pennoni Assoc, Inc*, 654 A2d 608, 614-615 (Pa Commw Ct, 1995), the defendants were township engineers who advised the

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[4] Similarly, here, it might be said that plaintiff did not have a reasonable expectation of *entitlement* to plan approval, where the site planning documents (such as the master deed) did not provide for a commercial use (a use of right), but more of a residential use.

township to delay development of a site until pollution could be remediated. The court applied the "shocks the conscience" standard.

Here, plaintiff has not presented evidence of any conduct by township officials that is so outrageous or arbitrary as to shock the conscience. Rather, the evidence indicated conduct intended to further the legitimate land use planning interests of the township (maintaining the integrity of the commercial zone in the village, and furthering the vitality of the village's commercial center). Therefore, the trial court did not err in rejecting the substantive due process claim.

c

Next, we consider the procedural due process claim. Plaintiff argues that the trial court applied an incorrect legal standard when it held that plaintiff had failed to prove that Webster had a personal pecuniary interest in the outcome of the township's land use planning proceedings. We disagree.

Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property. *Kampf v Kampf,* 237 Mich App 377, 382; 603 NW2d 295 (1999). Procedural due process generally requires notice, see *In re Nunn,* 168 Mich App 203, 208-209; 423 NW2d 619 (1988), an opportunity to be heard, *Traxler v Ford Motor Co,* 227 Mich App 276, 288; 576 NW2d 398 (1998), before an impartial trier of fact, *Newsome v Batavia Local School Dist,* 842 F2d 920, 927 (CA 6, 1988), and a written, although relatively informal, statement of findings, *Verbison v Auto Club Ins Ass'n,* 201 Mich App 635, 641; 506 NW2d 920 (1993). In other words, procedural due process requires that a party be

provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v Reed,* 265 Mich App 131, 159; 693 NW2d 825 (2005).

Logically, where a governmental actor has a personal pecuniary interest in the outcome of proceedings, he might not be an impartial decision maker. See, e.g., *Connally v Georgia,* 429 US 245; 97 S Ct 546; 50 L Ed 2d 444 (1977) (due process violated when a justice of the peace personally received $5 for each search warrant he issued, collected nothing when he denied a warrant, and had no other salary); *Gibson v Berryhill,* 411 US 564; 93 S Ct 1689; 36 L Ed 2d 488 (1973) (due process violated when members of a board with the power to bar optometrists from practice had their own private practices in competition with those who came before the board); compare *Alpha Epsilon Phi Tau Chapter Housing Ass'n v City of Berkeley*, 114 F3d 840, 845 (CA 9, 1997) (Byron R. White, retired associate justice of the United States Supreme Court, sitting by designation, held that a rent board's dual role as adjudicator and as executive body funded by its own registration fees did not render it a biased decision maker so as to violate due process).

In *DeBlasio v Zoning Bd of Adjustment for Twp of West Amwell*, 53 F3d 592 (CA 3, 1995), overruled on other grounds by *United Artists Theatre Circuit, Inc v Twp of Warrington, Pennsylvania,* 316 F3d 392, 400 (CA 3, 2003), the court held that New Jersey provided full judicial process for challenging adverse zoning decisions, thus precluding relief on a landowner's procedural due process claim, but a genuine issue of material fact existed regarding whether the ZBA's decisions were influenced by the ZBA secretary's personal financial interest in resolution of the landowner's zoning problems. See also *Spokane Co Legal Services, Inc v Legal*

Services Corp, 614 F2d 662 (CA 9, 1980) (the plaintiffs were not denied procedural due process in the action taken by the Legal Services Corporation to terminate financial support for their programs, even though the Legal Services Corporation appointed the special assistant to its president to conduct the hearing on the proposed transfer of funding; *there was no suggestion that the hearing examiner had* any personal bias or animosity against the plaintiffs or had *a pecuniary interest in the controversy*, and the appointment of a Legal Services Corporation employee to conduct the hearing was specifically authorized by federal regulation).

In light of the fact that having a personal pecuniary interest in the outcome of the land use planning proceedings would indicate a lack of an objective decision maker, it was logical for the trial court to conclude that *not* having such an interest (and not being motivated by such an interest) would point to the existence of an objective decision maker, and to the lack of merit of a procedural due process claim. Accordingly, it was not erroneous for the trial court to use, as part of its *ratio decidendi* in resolving that claim, the factual finding that plaintiff failed to prove that Webster had a personal pecuniary interest in the outcome of the planning process.

B

Next, plaintiff argues that the trial court erred when it held that the township officials' actions that the trial court found were wrongful were excused for purposes of 42 USC 1983 because the trial court believed that such officials acted in a way that they may have perceived to be in the best interest of the township. We disagree.

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Following a bench trial, this Court reviews the trial court's conclusions of law de novo, and its findings of fact for clear error. *Ligon, supra* at 124. Questions of law are reviewed de novo. *Morden, supra* at 340.

2

Plaintiff argues that the township officials' actions are attributable to the township because the actions were taken pursuant to a custom or policy of the township or under color of law, citing *Monell, supra* at 690. This argument lacks merit.

Plaintiff's argument regarding attribution is beside the point. The trial court never concluded that the township officials' actions were not attributable to the township. The trial court simply used, as part of its reasoning for denying parts of the procedural due process claim, its conclusions of fact (1) that Webster did not have a personal pecuniary interest in the outcome of the land use planning proceedings and (2) that Webster's conduct was not motivated by personal pecuniary interest. Plaintiff does not challenge these conclusions of fact on appeal; therefore, they must be accepted.

The only authority cited by plaintiff, *Monell*, does not show that the trial court erred as a matter of law by considering as relevant its findings regarding Webster's lack of personal pecuniary interest and lack of motive to further a personal pecuniary interest. Therefore, no error can be found under this issue on appeal.

C

Next, plaintiff argues that the trial court erred by reviewing, for purposes of the § 1983 claim, only se-

lected instances of conduct from the evidence presented at trial and then viewing those limited instances in isolation. We disagree.

In this argument section, plaintiff argues that the trial court reached an erroneous factual conclusion regarding all its remaining claims. But plaintiff does not identify the allegedly erroneous factual conclusion. Also, plaintiff fails to argue that any factual finding by the trial court was *clearly* erroneous. Therefore, the trial court's factual findings must be accepted.

Plaintiff argues that the trial court addressed only limited instances of the defendants' actions in isolation, citing *Bynum v ESAB Group, Inc*, 467 Mich 280; 651 NW2d 383 (2002), for the proposition that the record should have been viewed as a whole. Plaintiff argues in this section that Webster acted improperly in terminating Hermann as the planning commission chairman. This argument lacks merit.

The trial court found that although Webster acted improperly in terminating Hermann as a planning commission member, "plaintiff has failed to meet its burden of proof that Mr. Hermann's departure proximately caused the result it complains of," pointing out that the planning commission's vote against plaintiff's development was five to zero, and that the ZBA's relevant vote was also five to zero. This conclusion is sound.

Proximate cause is an essential element of a § 1983 claim. *Morden, supra* at 335 ("Plaintiff's theory of causation is also insufficient as a matter of law to establish the requisite proximate cause for a § 1983 claim."), citing *Horn v Madison Co Fiscal Court,* 22 F3d 653, 659 (CA 6, 1994) ("proximate causation is an essential element of a § 1983 claim for damages"). Proximate cause has, in turn, two components.

" 'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig v Oakwood Hosp* 471 Mich 67, 86; 684 NW2d 296 (2004). Cause in fact requires the plaintiff to show that but for the defendant's actions, the injury would not have occurred, while legal or proximate cause normally involves examining the foreseeability of consequences. *Id.* at 86-87. Cause in fact requires more than a possibility of causation:

> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he sets forth specific facts that would support a reasonable inference of a logical sequence of cause and effect. A valid theory of causation, therefore, must be based on facts in evidence. And while the evidence need not negate all other possible causes, . . . [it must] exclude other reasonable hypotheses with a fair amount of certainty. [*Id.* at 87-88 (emphasis in original; quotation marks and brackets omitted).]

Speculation in proving causation is prohibited, e.g., *Skinner v Square D Co,* 445 Mich 153, 166, 516 NW2d 475 (1994); *Ensink v Mecosta Co Gen Hosp,* 262 Mich App 518, 524-525; 687 NW2d 143 (2004), even on a statutory claim, *McManamon v Redford Charter Twp*, 273 Mich App 131, 139; 730 NW2d 757 (2006) (claim under the Employee Right to Know Act). The proof must " 'amount to a reasonable likelihood . . . rather than a possibility. The evidence need not negate all other possible causes, but . . . must exclude other reasonable hypotheses with a fair amount of certainty.' " *Skinner*, *supra* at 166 (citation omitted).

Plaintiff's implied[5] argument that Webster's improper removal of Hermann caused the rejection of its development plan amounts to speculation and conjecture because it does not exclude other possibilities to a reasonable degree of certainty. See *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 496; 668 NW2d 402 (2003). The removal of Hermann from the planning commission did not likely make a difference in the outcome of the planning commission's vote, because a planning commission majority would still have existed for disapproval of the development plan, unless Hermann's presence and advocacy would have swayed a sufficient number of the other members of the commission. But there was no evidence to that effect.

In short, the trial court did not view certain instances of conduct in isolation. It considered whether the improper termination of Hermann could have been a cause in fact of the rejection of the development plan, and found a lack of evidence in support of the required proof of causation in fact. Therefore, no error can be assigned here.

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[5] Plaintiff does not even expressly address causation in fact. Other than essentially to plead for a rule requiring that such causation need not be proved, arguing that it would be too difficult to prove, because township officials would never admit that they would have approved the development plan if Hermann had not been removed from the planning commission. Plaintiff argues: "Plaintiff was only required to show that the project was an allowed use under the Ordinance . . . .

The trial court imposed an impossible requirement . . . that Plaintiff was required to elicit from the wrongdoers that the project would have been approved because they had violated the law and would have changed their votes. If this standard were imposed, no 1983 claim would ever succeed." Plaintiff's complaint, that a number of § 1983 claims fail because of the difficulty in proving causation, notwithstanding, causation is, nevertheless, an essential element of a § 1983 claim. *Morden*, *supra* at 335; *Horn*, *supra* at 659.

D

Plaintiff next argues that the trial court committed error requiring reversal when it rejected plaintiff's claim for violation of § 1983 because the members of the planning commission voted five to zero against plaintiff's project and would not admit their wrongdoing or intimidation at trial. Again, we disagree.

The gist of plaintiff's argument is undeveloped, but it appears to repeat the argument that plaintiff should not be required to prove causation. As noted above, however, proximate causation is an essential element of a § 1983 claim. *Morden, supra* at 335; *Horn, supra* at 659. Because plaintiff cites no authority for its argument, we reject it as abandoned on appeal. *Etefia v Credit Technologies, Inc,* 245 Mich App 466, 471; 628 NW2d 577 (2001). An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes,* 265 Mich App 285, 299-300; 698 NW2d 879 (2005). This Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority. *In re Reisman Estate,* 266 Mich App 522, 533; 702 NW2d 658 (2005); *Peterson Novelties, Inc v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003). "It is not enough for an appellant in his brief simply to . . . assert an error and then leave it up to this Court to . . . unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959). See, generally, *Derderian v Genesys Health Care Systems,* 263 Mich App 364, 388; 689 NW2d 145 (2004).

Plaintiff argues that the trial court erred by dismissing plaintiff's claim seeking declaratory relief and its taking and promissory estoppel claims. We disagree.

Plaintiff first argues that the trial court erred in dismissing its inverse condemnation claim. This issue is not contained in the statement of questions presented; it is therefore deemed abandoned. *Ypsilanti Fire Marshal v Kircher (On Reconsideration),* 273 Mich App 496, 553; 730 NW2d 481 (2007), citing MCR 7.212(C)(5). Also, plaintiff fails to cite authority for this position, and the issue is therefore deemed abandoned. *Etefia, supra* at 471.

Next, plaintiff argues that the trial court erred in dismissing its claim for declaratory relief. But, declaratory relief is a remedy (equitable in nature,[6] because it is not a damages remedy), *Sturm, Ruger & Co, Inc v Occupational Safety & Health Admin*, 186 F3d 63, 64 (CA 1, 1999) ("declaratory relief is a remedy committed to judicial discretion and . . . the exercise of that discretion is properly informed by considerations of equitable restraint" [quotation marks and citation omitted]), not a claim. Therefore, the trial court did not dismiss any such claim.

In addition, all claims other than the damages claims were resolved by the partial consent judgment. Therefore, the trial court did not err in considering the request for declaratory relief to be moot. See *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

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[6] E.g., *East Bay Muni Utility Dist v Dep't of Forestry & Fire Protection*, 43 Cal App 4th 1113, 1121; 51 Cal Rptr 2d 299 (1996) (noting that declaratory relief is an equitable remedy and that it is often sought as a cumulative remedy in conjunction with requests for injunctive relief and mandamus). On questions of state law, Michigan courts are not bound by foreign authority, *Campbell v Kovich*, 273 Mich App 227, 231; 731 NW2d 112 (2006), but may find it persuasive, *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

Next, plaintiff argues that the trial court erred in "dismissing" its taking claim. We disagree. Although plaintiff cites *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978), plaintiff provides no analysis for this argument, merely stating, conclusorily, that "Plaintiff's reasonable investment-backed expectations (per the Ordinance) were denied due to Defendants' conduct." Plaintiff dedicates only one sentence in a 50-page brief to analysis of alleged error in rejecting the taking claim.

Further, plaintiff makes a more fundamental error in its characterization of and challenge to the trial court's decision. The trial court did not "dismiss" the taking claim. The taking claim was tried. In its verdict (or "decision after trial"), the trial court found no cause of action on the taking claim. The decision after trial concluded that "there was no unconstitutional temporary taking of the plaintiff's property" and "no cause for action for damages."

Plaintiff points to no basis on which the trial court's finding of no temporary taking was erroneous as a matter of law. Rather, plaintiff essentially challenges the trier of fact's conclusion that no taking occurred, stating that "the conduct discussed above should have been sufficient to establish the elements of Plaintiff's taking claim . . . ." An appellant cannot challenge a verdict's merits as such; an appellant must either show that the verdict was against the great weight of the evidence (which plaintiff does not argue), or that after a bench trial the trial court's findings of fact were clearly erroneous, or that its conclusions of law were legally erroneous. *Ligon, supra* at 124. With regard to the taking claim, plaintiff makes none of these arguments. Therefore plaintiff's assigned error regarding the taking claim must fail.

Plaintiff also argues that the trial court erred in "dismissing" its promissory estoppel claim. However, plaintiff cites no authority for this argument. Therefore, it is deemed abandoned on appeal. *Etefia, supra* at 471.

III

(1)(a) The trial court did not err in rejecting the substantive due process claim, because plaintiff failed to show evidence that defendants' behavior was so arbitrary as to shock the conscience. (b) The trial court did not apply an incorrect legal standard to plaintiff's procedural due process claim, because whether an official has a personal pecuniary interest in the outcome of a matter is relevant to whether there was an objective decision maker. (2) Plaintiff has failed to show that the trial court erred as a matter of law in considering as relevant its findings regarding Webster's lack of personal pecuniary interest and lack of motive to further a personal pecuniary interest. (3) The trial court did not view certain instances of conduct in isolation; it considered whether the improper termination of Hermann could have been a cause in fact of the rejection of the development plan, and found a lack of evidence of causation in fact. (4) The trial court did not err as a matter of law in considering that the planning commission voted five to zero against plaintiff's preliminary development plan. (5) (a) Plaintiff abandoned its claim that the trial court erred in dismissing its inverse condemnation claim. (b) The trial court did not dismiss a claim for declaratory relief; declaratory relief is a remedy, not a claim. (c) The trial court did not err in finding no cause for action on the temporary taking claim.

Affirmed.

BUCKLEY v PROFESSIONAL PLAZA CLINIC CORPORATION

Docket No. 277028. Submitted August 12, 2008, at Detroit. Decided October 2, 2008, at 9:10 a.m. Leave to appeal sought.

Alice Buckley filed a complaint in the Department of Labor and Economic Growth (DLEG), Wage and Hour Division, alleging that Professional Plaza Clinic Corporation (PPCC), for whom Buckley provided medical services pursuant to an employment agreement, had failed to pay her wages that she was owed. DLEG determined that Buckley was entitled to back pay, with interest, under the payment of wages and fringe benefits act, MCL 408.471 *et seq*. PPCC appealed to a DLEG hearing referee, arguing that Buckley was an independent contractor and not an employee. The hearing referee applied the economic reality test and ruled that, although the employment agreement made references to Buckley as an independent contractor, Buckley was in fact an employee. PPCC appealed in the Wayne Circuit Court, Michael J. Callahan, J., which reversed the ruling of the hearing referee. DLEG and Buckley appealed by leave granted.

The Court of Appeals *held*:

1. The correct legal test to determine whether Buckley was an employee or an independent contractor, for purposes of the payment of wages and fringe benefits act, is the economic reality test, because the act is remedial in nature and the economic reality test is consistent with the act's purposes. Accordingly, the circuit court applied an incorrect principle of law when it failed to use the economic reality test to review the hearing referee's decision.

2. The circuit court clearly erred by ignoring the substantial evidence on which the hearing referee relied in ruling that Buckley was an independent contractor rather than an employee. A reviewing court may not set aside factual findings that are supported by the evidence merely because alternative findings could also have been supported by the evidence, or because the court might have reached a different result.

Reversed.

ADMINISTRATIVE LAW — PAYMENT OF WAGES AND FRINGE BENEFITS ACT — EMPLOYER-EMPLOYEE RELATIONSHIP — ECONOMIC REALITY TEST.

The correct standard for determining whether a person is an

> employee under the payment of wages and fringe benefits act is the economic reality test, whose nonexclusive factors include the control of the worker's duties; the payment of wages; the right to hire, fire, and discipline; and the performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal (MCL 408.471 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Susan Przekop-Shaw* and *Richard P. Gartner*, Assistant Attorneys General, for the appellants.

Aziz Khondker for the appellee.

Before: MURRAY, P.J., and WHITBECK and TALBOT, JJ.

PER CURIAM. This case involves a wage dispute under Michigan's payment of wages and fringe benefits act (payment of wages act).[1] Appellant Alice Buckley, M.D., sought allegedly unpaid wages from appellee Professional Plaza Clinic Corporation (PPCC), which PPCC refused to provide. Appellant Department of Labor and Economic Growth agreed with Dr. Buckley and awarded her $15,979.14 in back pay, plus 10 percent annual interest and a $1,000 civil penalty. PPCC appealed the department's determination and order to a hearing referee, who affirmed. The trial court reversed, ruling that Dr. Buckley was an independent contractor and was not entitled to any unpaid wages under the payment of wages act. The department and Dr. Buckley now appeal by leave granted. We reverse the judgment of the circuit court and reinstate the decision of the hearing referee.

I. BASIC FACTS AND PROCEDURAL HISTORY

Dr. Buckley is an internal medicine physician. On November 19, 2004, Dr. Buckley entered into an em-

[1] MCL 408.471 *et seq*.

ployment agreement (the agreement) with PPCC to provide medical services to patients at the facility. Under the agreement, PPCC was to pay Dr. Buckley $130,000 for a one-year term, which equaled $2,500 a week. The agreement contained references to both "employee" and "independent contractor." More specifically, the agreement contained the following relevant provisions:

> EMPLOYEE: In its usual sense employee is a person over whom Employer has control as to time or attendance and the employee is engaged in furtherance of Employer's business. This Employment Agreement (hereinafter Agreement) deals with an agreement between a corporate employer and an Independent Contractor unless otherwise noted.
>
> INDEPENDENT CONTRACTOR: Employee is encouraged to consult IRS code related to an independent contractor, mainly "whose control" and "whose business" tests.
>
> PREAMBLE
>
> Agreement made on November 01, 2004[2] between Professional Plaza Clinic Corporation, a corporation organized and existing under the laws of the State of Michigan, with its principal office located at 3800 Woodward Avenue, Detroit, Wayne County, Michigan, referred to in this agreement as employer, and Dr. Alice Buckley, of 3800 Woodward Avenue, Detroit, Wayne County, Michigan, referred to in this agreement as employee.

The agreement provided that the employer would determine the "employee's specific duties" and that the employer had discretion in "setting the days of the week and hours in which employee is to perform employee's

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[2] "Section Two" of the agreement, entitled "Term of Employment," stated that the agreement "was effective on November 19, 2004 and shall remain in effect until November 19, 2005 . . . ."

duties[.]" The remaining sections of the agreement also used the term "employee." However, the term "independent contractor" occurred again at the signature line. Dr. Buckley did not sign the agreement itself, but rather an amendment of the agreement.

On November 23, 2004, Dr. Buckley also signed a W-9 (usually supplied to independent contractors and other self-employed workers). Under this arrangement, PPCC did not withhold any money from Dr. Buckley's paycheck, and she was responsible for paying taxes herself. Dr. Buckley paid her state and federal income taxes using a 1099 form (for independent contractors).

During the time that she worked at PPCC, Dr. Buckley received three checks, each for $2,500, and two others for $3,300 and $1,450, for a total of $12,250. However, Dr. Buckley voluntarily stopped working for PPCC on February 11, 2005, allegedly because PPCC was behind in paying her and she did not want to work without getting paid. Dr. Buckley filed a complaint with the department's Wage and Hour Division, alleging that PPCC failed to pay her wages owed. The department agreed with Dr. Buckley and awarded her $15,979.14 in back pay for "wages earned from November 1, 2004 to February 11, 2005." The department also ordered PPCC to pay 10 percent annual interest and a $1,000 civil penalty if the amount was not voluntarily paid.

PPCC appealed that determination before a department hearing referee, contending that Dr. Buckley was an independent contractor and had been paid in full. Dr. Buckley maintained that she was an employee entitled to unpaid wages.

During an August 2006 hearing before the hearing referee, Andrea McBride, PPCC's chief executive officer, testified that the employment agreement that Dr. Buckley signed was created as a general document to be

used "for employment of the doctors . . . as they [came] in." As in Dr. Buckley's case, an amendment was then prepared detailing each particular doctor's salary. Contrary to Dr. Buckley's testimony, McBride testified that Dr. Buckley started working on November 20, 2004, and then worked again on November 23, 29, and 30. In December 2004, McBride testified, Dr. Buckley worked 11 days. McBride further stated that Dr. Buckley worked six days in January 2005, and six days in February 2005. McBride stated that Dr. Buckley worked an average of seven hours a day on the days that she worked in November through February. McBride believed that although Dr. Buckley was not paid the whole monthly salary in November, December, January, or February, PPCC did pay Dr. Buckley in full for the services provided on the days she worked. However, McBride testified that doctors at the clinic are paid the same rate, whether they go over or under a few hours, because it balances out over the long run. McBride stated that she did not dictate what time Dr. Buckley came to work and that Dr. Buckley had full control over her patients. McBride also admitted that she could have fired Dr. Buckley for allegedly unruly conduct (McBride testified that Dr. Buckley "would get upset, fly off the handle, walk out of the clinic, [and] curse"), but she did not because Dr. Buckley told her that "she was going through some issues."

PPCC's office manager, Linda Foster, testified that Dr. Buckley started working at PPCC during the first week of November 2004. Foster also testified that Dr. Buckley was to be paid on a weekly basis while employed and that she was expected to work 40 hours each week. According to Foster, Dr. Buckley worked 40 hours a week in November and December, and for only a couple of weeks in January and "not that much" in February because Dr. Buckley was not getting paid.

However, Foster noted that no time sheets were kept and that she did not know exactly how many hours Dr. Buckley worked. Foster testified that she believed that Dr. Buckley was a salaried employee.

Dr. Buckley also testified during the hearing. According to Dr. Buckley, she began working for PPCC on November 2, 2004, as a salaried employee. Dr. Buckley confirmed that she signed the W-9 form and that PPCC did not withhold taxes from her paychecks, but she claimed that PPCC told her that it would start withholding taxes once it got a payroll system in place. She asserted that she controlled her own hours, but she claimed that she was supposed to, and did, work from 9:00 a.m. to 5:00 p.m. for all four weeks in November, excluding the Thanksgiving holiday. She believed that as a salaried employee she was supposed to be paid for the holiday. She stated that she also worked full time in December, or 4 1/2 weeks, with the understanding that she would be paid for the days she took off for personal reasons and holidays. Dr. Buckley explained that she began limiting her hours in January 2005, working only just over 50 hours, because PPCC was behind in paying her and she did not see the sense in working and not getting paid.

In his written decision, the hearing referee determined that Dr. Buckley worked at PPCC from November 2, 2004, through February 11, 2005. Although acknowledging that there was some reference to "independent contractor" in the agreement, the hearing referee applied the economic reality test[3] and found it significant that the employment agreement outlined the parties' responsibilities and set forth Dr. Buckley's duties, hours, compensation, and vacation time. Therefore, the hearing referee determined that Dr. Buckley was a PPCC employee for the entire period in question.

[3] See *Askew v Macomber*, 398 Mich 212, 217-218; 247 NW2d 288 (1976).

On the basis of his calculations of Dr. Buckley's time worked, the hearing referee adjusted the amount that PPCC owed Dr. Buckley to "$15,500.00 at the rate of 10% per annum, together with a civil penalty in the amount of $1000.00 if payment is not voluntarily made."

PPCC thereafter appealed to the circuit court,[4] arguing that the evidence and testimony established that Dr. Buckley was an independent contractor. PPCC conceded that Dr. Buckley worked at PPCC from November 2, 2004, through February 11, 2005, but it argued that the hearing officer erred in awarding Dr. Buckley two entire months' pay for November and December 2004, because she only worked 4 days in November and 12 days in December. PPCC further argued that the proper test to determine whether Dr. Buckley was an employee or an independent contractor was the test used by the Internal Revenue Service (IRS), which examined behavioral control, financial control, and the relationship of the parties. Therefore, PPCC asserted, the hearing referee erred in applying the economic reality test.

The department maintained that Dr. Buckley was an employee, pointing to the repeated use of the term "employee" in the agreement. Further, the department pointed out, the agreement gave PPCC the power to set forth Dr. Buckley's duties and hours, and provided that PPCC was responsible for supplying Dr. Buckley with an office and all necessary equipment. The department also argued that the termination for cause and noncompete clauses in the agreement supported the existence of an employer-employee relationship, noting that such clauses would not have been necessary for an independent contractor.

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[4] See MCL 408.481(9).

The circuit court found it significant that PPCC did not withhold income taxes for Dr. Buckley and that she paid her own taxes as an independent contractor. The circuit court also noted, despite the language of the employment agreement, that "[t]he clinic clearly treated her as an independent contractor by not dictating her professional duties, by not dictating her hours." Accordingly, the circuit court reversed, ruling that Dr. Buckley was an independent contractor. The department and Buckley now appeal.

II. CONTRACTUAL AMBIGUITY AND THE ECONOMIC REALITY TEST

A. STANDARD OF REVIEW

The department and Dr. Buckley contend that the circuit court exceeded the scope of its appellate review and applied the wrong legal standard when it ruled that Dr. Buckley was not PPCC's employee.

This Court's review of a circuit court's ruling on an appeal from an administrative decision is limited.[5] "This Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings."[6] This standard is synonymous with the clear-error standard of review.[7] Under this standard, this Court will only overturn the circuit court's decision if, on review of the whole record, it is left with a "definite and firm conviction that a mistake has been made."[8] A circuit court's review of administrative proceedings is limited to deter-

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[5] *Adams v West Ottawa Pub Schools*, 277 Mich App 461, 465; 746 NW2d 113 (2008).

[6] *Id*. (quotation marks and citations omitted).

[7] *Id*.

[8] *Id*.

mining whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record.[9] "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision. It is more than a mere scintilla but less than a preponderance of the evidence."[10] When there is sufficient evidence, the circuit court must not substitute its discretion for that of the administrative tribunal even if the court might have reached a different result.[11] It does not matter that alternative findings also could have been supported by substantial evidence on the record.[12] The circuit court must give deference to the agency's findings of fact.[13]

> [A]gency interpretations are entitled to respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute. While the agency's interpretation may be helpful in ascertaining the legislative intent, courts may not abdicate to administrative agencies the constitutional responsibility to construe statutes. Giving uncritical deference to an administrative agency would be such an improper abdication of duty.[14]

B. EMPLOYEE'S RIGHT TO RECOUP UNPAID WAGES UNDER THE PAYMENT OF WAGES ACT

The payment of wages act provides, in pertinent part, regarding voluntary termination of employment: "An

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[9] Const 1963, art 6, § 28; *In re Complaint of Rovas against SBC Michigan*, 482 Mich 90, 99-100; 754 NW2d 259 (2008); *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005).

[10] *In re Kurzyniec Estate*, 207 Mich App 531, 537; 526 NW2d 191 (1994) (citation omitted).

[11] *VanZandt*, *supra* at 584.

[12] *Dep't of Community Health v Risch*, 274 Mich App 365, 373; 733 NW2d 403 (2007).

[13] *VanZandt*, *supra* at 588.

[14] *In re Rovas Complaint*, *supra* at 117-118.

employer shall pay to an employee voluntarily leaving employment all wages earned and due, as soon as the amount can with due diligence be determined."[15] Concomitantly, the act allows an employee to file a complaint with the department to recoup any allegedly unpaid wages.[16]

C. DEFINITIONS

The payment of wages act defines "employee" as an "individual employed by an employer."[17] It defines "employer" as "an individual, sole proprietorship, partnership, association, or corporation, public or private . . . who employs 1 or more individuals."[18] And it defines "employ" as "to engage or permit to work."[19] It prescribes a number of rules that employers must follow, such as withholding of taxes and timing of pay period days.[20]

This Court has defined an independent contractor as " 'one who, carrying on an independent business, contracts to do work without being subject to the right of control by the employer as to the method of work but only as to the result to be accomplished.' "[21]

D. DETERMINATION OF CORRECT LEGAL PRINCIPLE

"As this Court has repeatedly recognized when interpreting the terms 'employ,' 'employer,' or 'employee' in different statutory and factual contexts, the existence of

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[15] MCL 408.475(1).

[16] MCL 408.481.

[17] MCL 408.471(c).

[18] MCL 408.471(d).

[19] MCL 408.471(b).

[20] See MCL 408.472; MCL 408.474.

[21] *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992), quoting *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 622-623; 335 NW2d 106 (1983).

an employment relationship is typically determined by examining a number of factors."[22] Our governmental agencies and courts have developed different tests, depending on the circumstances, to ascertain the true nature of an employment relationship.[23] For example, "[a] contract between the parties which states that their relationship is that of an independent contractor is . . . a factor to be considered, although it is not determinative."[24]

The economic reality test is the most common tool for discerning whether an employee-employer relationship exists. Although primarily applied in the context of remedial legislation, like workers' compensation matters,[25] courts have found the test instructive in other contexts as well. For example, in *Coblentz v City of Novi*,[26] the Michigan Supreme Court held that under the Freedom of Information Act provision allowing recovery of costs associated with employees, the economic reality test was the proper analytical framework.[27]

This test takes into account the totality of the circumstances around the work performed,[28] with an emphasis on the following factors:

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[22] *Mantei v Michigan Pub School Employees Retirement Sys and Michigan Pub School Employees Retirement Bd*, 256 Mich App 64, 76; 663 NW2d 486 (2003).

[23] *Id*.

[24] *Detroit v Salaried Physicians Professional Ass'n, UAW*, 165 Mich App 142, 148; 418 NW2d 679 (1987).

[25] See, e.g., *Renfroe v Higgins Rack Coating & Mfg Co, Inc*, 17 Mich App 259, 264; 169 NW2d 326 (1969).

[26] *Coblentz v City of Novi*, 475 Mich 558; 719 NW2d 73 (2006).

[27] *Id*. at 578, addressing MCL 15.234(3). See also *Mantei*, *supra* at 79 ("[W]e conclude in the instant case, where respondeat superior liability is not at issue, that the economic-reality test is the appropriate legal tool with which to assess whether petitioner was 'employed by a reporting unit' under § 61 of the retirement act.").

[28] *Mantei*, *supra* at 79.

> "(1) [the] control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal."[29]

Under this test, no one factor is dispositive; indeed, the list of factors is nonexclusive and a court may consider other factors as each individual case requires.[30] However, "[w]eight should be given to those factors that most favorably effectuate the objectives of the statute in question."[31]

E. APPLICATION OF CORRECT LEGAL PRINCIPLE

Here, the hearing referee applied the economic reality test. Again, Michigan courts have consistently applied the economic reality test in the context of social remedial legislation.[32] A "remedial law" is "[a] law providing a means to enforce rights or redress injuries" or "[a] law passed to correct or modify an existing law . . . ."[33] The payment of wages act is remedial in that it provides a means to enforce rights with respect to wages and fringe benefits and prescribes remedies for violations of these rights. Further, application of the economic reality test, which takes into account the payment of wages, does not conflict with the plain meaning of the statute.[34] Thus, the hearing referee

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[29] *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688; 594 NW2d 447 (1999), quoting *Askew*, *supra* at 217-218 (alteration in *Clark*). See also *Mantei*, *supr*a at 78-79.

[30] *Rakowski v Sarb*, 269 Mich App 619, 625; 713 NW2d 787 (2006); *Mantei*, *supra* at 79.

[31] *Rakowski*, *supra* at 626 (citation and quotation marks omitted).

[32] See, e.g., *Renfroe*, *supra* at 264.

[33] Black's Law Dictionary (8th ed).

[34] *In re Rovas Complaint*, *supra* at 117-118.

appropriately applied the test in this case because the test is consistent with the purposes of the payment of wages act.

Conversely, in the present matter, the circuit court did not explicitly articulate any principle of law that aided it in determining that Dr. Buckley was an independent contractor. Rather, the circuit court looked only to the facts that PPCC did not withhold any taxes from Dr. Buckley's paychecks and that PPCC lacked control over Dr. Buckley's duties and hours. Thus, we conclude that the circuit court clearly erred because it failed to apply, or misapplied, the economic reality test.

We note that PPCC attempts to support its position with reliance on the IRS's test for determining whether an individual is an independent contractor. However, PPCC cites no authority that this test should be applied in place of this jurisdiction's longstanding reliance on the economic reality test. And, more importantly, there is no indication in the record that the circuit court relied on the IRS test in making its determination.

F. SUBSTANTIAL EVIDENCE

As previously stated, a circuit court's review of administrative proceedings is limited to determining whether the decision was authorized by law and supported by competent, material, and substantial evidence on the whole record.[35] And, here, substantial evidence adequately supported the hearing referee's decision that Dr. Buckley was an employee.

Evidence was presented that PPCC treated Dr. Buckley as an employee. PPCC's office manager testified that Dr. Buckley was a salaried employee paid on a weekly basis and that PPCC expected Dr. Buckley to

[35] Const 1963, art 6, § 28; *VanZandt*, *supra* at 588.

work 40 hours each week. PPCC's chief executive officer also testified that she had the authority to fire Dr. Buckley and that Dr. Buckley was to be paid the same rate each week, regardless of whether she worked over or under a few hours. Further, the agreement between Dr. Buckley and PPCC contained provisions indicating an employee-employer relationship. Specifically, the agreement set a term of employment, gave PPCC the power to determine Dr. Buckley's duties and hours, contained a noncompete clause, granted PPCC the discretion to terminate the relationship "for reasonable cause," and offered a "salary of $130,000" for a one-year commitment. This evidence was adequate to support a finding that Dr. Buckley was an employee.[36]

Nevertheless, the circuit court provided the following reasons for reversing the hearing referee's decision:

> I think the judgment of the court below, the administrative law judge . . . must be reversed. I think he was flat out dead wrong on the issue of whether or not this woman was an independent contractor. I think all the evidence points to the fact that she was.
>
> The contract contained language both ways whether she was an independent contractor or an employee. The clinic clearly treated her as an independent contractor by not dictating her professional duties, by not dictating her hours. I assume everybody knew she had to come when the patients were there. Otherwise she wouldn't be very effective as a doctor. They didn't withhold taxes. That's consistent with being an independent contractor.
>
> In fact, if they did not withhold taxes and she was an employee, there [sic] were in clear violation of . . . the tax requirements of Michigan law for employers. I don't know why the judge below did what he did. Frankly, he had all the items of evidence in front of him and he simply concluded that wage and hourly applied and he would give

[36] See *In re Kurzyniec Estate*, *supra* at 537.

> a result. He even compromised his result. I have no idea why he did that except it's a further indication to me that he decided incorrectly.
>
> The judgment below is reversed. I find as a matter of law that the woman was an independent contractor . . . .

These statements reflect several instances of clear error. As already noted, the court failed to apply the economic reality test and focused its analysis primarily on the element of control. Further, the circuit court ignored the substantial evidence on which the hearing referee relied and made no assessment regarding whether that evidence adequately supported his decision. Rather, the circuit court simply concluded that the hearing referee reached the wrong outcome because all the evidence, in the court's view, indicated that Dr. Buckley was an independent contractor. According to the court, the referee was "flat out dead wrong" on the issue. However, as this Court has stated, "[a] reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result."[37] In this case, the hearing referee noted that while the agreement contained an "independent contractor" reference, the agreement nonetheless set forth Dr. Buckley's duties, hours, rate of compensation, and vacation time. The referee also stated that he relied on other evidence and testimony to conclude that Dr. Buckley was an employee. The fact that some of the evidence supported the finding that Dr. Buckley was an independent contractor does not warrant the circuit court's setting aside the referee's findings.

PPCC also asserts that the testimony of its office manager was inherently unreliable because she was a

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[37] *Risch*, *supra* at 373.

disgruntled employee and therefore a biased witness. However, "if the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence."[38]

III. CONCLUSION

The circuit court applied an incorrect principle of law when it did not use the correct standard to review the hearing referee's decision. Further, substantial evidence supported the referee's decision that an employee-employer relationship existed between Dr. Buckley and PPCC. Accordingly, we reverse the judgment of the circuit court and reinstate the decision of the hearing referee.

Reversed.

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[38] *Id*. at 372.

DAIMLERCHRYSLER CORPORATION
v WESCO DISTRIBUTION, INC

Docket No. 276174. Submitted August 13, 2008, at Detroit. Decided October 2, 2008, at 9:15 a.m. Leave to appeal sought.

DaimlerChrysler Corporation brought an action in the Wayne Circuit Court against Wesco Distribution, Inc., and High Voltage Maintenance Corporation, seeking contractual indemnification from Wesco for money DaimlerChrysler paid to Mark Stephens in settlement of a personal-injury action. Stephens had sustained injury at a DaimlerChrysler plant while inspecting electrical equipment that needed repair. Stephens was an engineer for Eaton Electrical Engineering and Services Division, which used Wesco as an intermediary to provide customers with price quotations for repair jobs and secure purchase orders for such jobs. After Stephens's injury, Wesco had submitted to DaimlerChrysler a quotation that included a provision for indemnification of Wesco by DaimlerChrysler for any loss arising out of the performance of the repair work. The purchase order DaimlerChrysler sent to Wesco to authorize the repair work included a contradictory provision calling for Wesco to indemnify DaimlerChrysler for any loss related to the repair work. The repair work was then completed. Wesco moved for summary disposition, but the trial court, Cynthia D. Stephens, instead granted summary disposition for DaimlerChrysler and ordered Wesco to indemnify Chrysler for the settlement amount, as well as for the related attorney fees and litigation expenses. Wesco appealed.

The Court of Appeals *held*:

1. DaimlerChrysler's purchase order, not Wesco's quotation, constituted the final agreement between those parties. By submitting the purchase order, DaimlerChrysler made a counteroffer, which Wesco accepted when the work was performed.

2. The trial court erred by ruling that the indemnity provision in DaimlerChrysler's purchase order applied to Stephens's injury, which occurred before the contract between Wesco and DaimlerChrysler was formed. An indemnification contract does not apply

retroactively unless the contracting parties expressly provide so in their contract. The contract in this case does not expressly provide for retroactive indemnification.

Reversed and remanded for entry of summary disposition for Wesco.

1. CONTRACTS — OFFER AND ACCEPTANCE — COUNTEROFFERS.

An acceptance must be in strict compliance with the offer in order for a contract to be formed; a material departure in an acceptance from the terms of an offer of services constitutes a counteroffer by the offeree, which the offeror can accept by performing the services.

2. INDEMNITY — CONTRACTUAL INDEMNIFICATION — RETROACTIVE APPLICATION OF INDEMNITY PROVISIONS.

An indemnification contract does not apply retroactively for loss before the contract's formation, unless the contracting parties expressly provide for retroactive indemnification in their contract.

DeNardis, McCandless & Miller, P.C. (by *William McCandless* and *Mark F. Miller*), for DaimlerChrysler Corporation.

Strobl & Sharp, P.C. (by *Alan C. Harnish*), and *John P. Jacobs, P.C.* (by *John P. Jacobs* and *Andrew T. Strahan*), for Wesco Distribution, Inc.

Before: MURRAY, P.J., and WHITBECK and TALBOT, JJ.

MURRAY, P.J. Defendant, Wesco Distribution, Inc., appeals as of right the trial court's order of judgment for plaintiff, DaimlerChrysler Corporation (Chrysler). Wesco's arguments on appeal pertain to the trial court's order granting summary disposition for Chrysler with respect to liability. Although Wesco posits several arguments for reversal, we find one dispositive. That is, Wesco could not be held liable to indemnify Chrysler under this contract for an injury that occurred before the contract was formed. On this basis, we reverse and remand.

I. FACTS AND PROCEEDINGS

Wesco, a distributor, has a business relationship with Eaton Electrical Engineering Services and Systems Division, which provides service and support to users of Eaton Electrical products and supports factories with warranties and other equipment needs. Eaton uses distributors like Wesco as intermediaries when performing electrical work for customers like Chrysler. In general, Eaton prepares a quotation for the work to be performed and submits it to Wesco. Wesco then applies a markup and supplies the quotation to the customer. If Wesco and Eaton are awarded the job, Wesco then receives a purchase order from the customer and sends it to Eaton, which performs the work.

On July 23, 2002, Jay Karnik and Jack Hemmert of Chrysler called Mark Stephens, a field services engineer for Eaton, and asked him to come to Chrysler's plant in Newark, Delaware, to look at some damaged electrical equipment contained in a capacitor bank and prepare a quotation for the work that would be required to repair it. When Stephens arrived at the plant, two or three High Voltage Maintenance Corporation (HVMC) employees were working on electrical equipment near the damaged capacitator bank. After Stephens finished gathering the information necessary to formulate a quotation for the repairs, Hemmert asked Stephens if he could borrow a phase rotation meter. Stephens retrieved the meter from his van and handed it to Hemmert. Stephens eventually sought to retrieve his meter. The Chrysler employees were about to use the meter, but one of them handed the meter to Stephens instead because it was "[his] device." One of the HVMC employees, who were standing next to Stephens, touched two of the leads to the transformer. Stephens

then touched the third lead to the transformer, and pushed the button. The equipment then exploded.

According to Dale Schmidt, a district manager for Eaton, Eaton was not able to use the information Stephens collected on that day because his notes were lost or destroyed during the accident. Schmidt and Jimi Jones, an Eaton employee responsible for direct sales, ultimately returned to the Delaware facility and "started from scratch," recollecting the information, and reformulating the quotation. In determining the extent of the damage, they "probably" also used some photographs that Stephens had taken of the equipment on July 23, 2002. The work of Schmidt and Jones resulted in an August 2, 2002, quotation from Eaton to Wesco, which Wesco used to formulate the quotation that it submitted to Chrysler, also on August 2, 2002. Wesco's quotation describes the work to be performed as "LABOR AND MATERIAL TO COMPLETE SERVICE WORK AND A 5KV METAL ENCLOSED CAPACITATOR BANK" and quotes the prices as $17,461, or $21,649 with optional overtime hours.

On August 8, 2002, Chrysler issued a purchase order to Wesco, which describes the work to be performed as follows: "PROVIDE ALL LABOR, MATERIAL AND SUPERVISION TO SERVICE, TROUBLE SHOOT AND REPAIR (1) 5KV, METAL ENCLOSED CAPACITATOR BANK." It also refers to Wesco's August 2, 2002, quotation, and lists the same $17,461 price. The purchase order includes an indemnification clause, which provides, in part: "Seller . . . shall protect, defend, hold harmless, and indemnify DaimlerChrysler from and against any and all loss . . . arising out of or related to the performance of any work in connection with this contract." On September 26, 2002, Wesco issued Chrysler an invoice, in the amount of $17,461,

for the repair of the capacitator bank, which Chrysler paid without objection on October 30, 2002.

In 2003, Stephens filed a personal injury action against Chrysler and HVMC in a Pennsylvania state court. Chrysler sought indemnification from Wesco and HVMC. They apparently refused, and Chrysler filed this action. As part of a settlement agreement between Stephens, HVMC, and Chrysler, Chrysler agreed to dismiss its claims against HVMC, and the trial court entered an order to that effect. Wesco filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). The trial court, pursuant to MCR 2.116(I)(2), instead granted summary disposition for Chrysler with respect to liability, and thereafter entered judgment for Chrysler, awarding it $941,894.81, which included the $750,000 settlement that Chrysler paid to Stephens, attorney fees, litigation expenses, and prejudgment interest on those amounts.

II. ANALYSIS

We review a trial court's decision on a motion for summary disposition de novo. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). Although Wesco brought its motion for summary disposition under both MCR 2.116(C)(8) and (C)(10), the trial court decided the motion under MCR 2.116(C)(10) because it considered documentary evidence submitted by the parties. When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose*, *supra* at 461. Summary disposition is appropriate "if there is no genuine issue regarding any material fact and the

moving party is entitled to judgment as a matter of law." In addition, under MCR 2.116(I)(2), summary disposition in favor of the opposing party is properly granted if the Court determines that that party, rather than the moving party, is entitled to judgment. MCR 2.116(I)(2); *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). We also review de novo, as questions of law, issues concerning the interpretation of a contract. *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 184-185; 678 NW2d 647 (2003).

Before addressing the indemnity issue, we first dispatch with Wesco's argument that the August 8, 2002, purchase order was not the final contract. Wesco bases much of its argument on an analysis of the parties' exchange of documents under the Uniform Commercial Code-Sales (UCC), MCL 440.2101 *et seq*. However, the UCC does not apply in this case because the primary purpose of the contract was the provision of services, rather than goods, and the UCC applies to transactions in goods. MCL 440.2102; *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 536-537; 486 NW2d 612 (1992); *Farm Bureau Mut Ins Co v Combustion Research Corp*, 255 Mich App 715, 723; 662 NW2d 439 (2003). Here, Wesco's quotation of August 2, 2002, and Chrysler's August 8, 2002, purchase order make it clear that a service—repair of the capacitator bank—was the primary purpose of the parties' contract, and the provision of necessary materials was incidental to the repairs. Therefore, this contract dispute is governed by the common law, rather than the UCC.

Applying the common law, the trial court correctly held that the August 8, 2002, purchase order constituted a counteroffer, which Wesco accepted by its performance. "Before a contract can be completed, there

must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006) (quotation marks and citation omitted.) "Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Id*. at 453. Wesco's August 2, 2002, quotation provided:

> This quotation constitutes an offer to sell which offer expressly limits acceptance to the terms of this offer on the back of this quotation. This offer shall be firm for a period of fifteen (15) days from the date of this offer. Subject to Buyer's credit worthiness, the return of this form with a Purchase Order number or any other reasonable manner of acceptance will be sufficient to form an agreement on the terms and conditions on the back of or attached to this quotation.

"An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Kloian*, *supra* at 453 (quotation marks and citation omitted). Wesco's quotation constituted an offer because it expressed Wesco's willingness to enter into an agreement and invited Chrysler's assent.

Chrysler responded with a purchase order that mirrors the key terms of Wesco's offer: listing the services to be performed, as well as the price, and referring to Wesco's quotation. However, the purchase order also states, "SELLER AGREES TO SELL AND DELIVER THE GOODS OR SERVICES IN ACCORDANCE WITH THE TERMS AND CONDITIONS CONTAINED IN THE ORDER." Clause # 054 of the purchase order, which requires Wesco to indemnify Chrysler, conflicts with a provision in Wesco's terms and conditions requiring Chrysler to indemnify Wesco.

Because an acceptance must be in strict compliance with the offer in order for an agreement to be formed, no contract was formed at this point. *Kloian*, *supra* at 452-453. Rather, Chrysler's purchase order constituted a rejection of Wesco's offer, and instead was a counteroffer. *Harper Bldg Co v Kaplan*, 332 Mich 651, 655; 52 NW2d 536 (1952); see also 2 Williston, Contracts (4th ed), § 6.11, pp 110-117 ("[B]ecause the offeror is entitled to receive what it is it has bargained for, if any provision is added to which the offeror did not assent, the consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected, and that the offeree's power of acceptance is thereafter terminated.").

Wesco accepted this counteroffer by performing the contract work. See *Sanchez v Eagle Alloy, Inc*, 254 Mich App 651, 666; 658 NW2d 510 (2003) ("A meeting of the minds can be found from performance and acquiescence in that performance."); Williston, § 6.25, pp 331-341, 350-357 (noting that the drafters of the Restatement Second take the position that, absent a contrary indication in the offer, the offeree will be entitled to accept either by promising to perform or by rendering performance). Therefore, Chrysler's August 8, 2002, purchase order constitutes the agreement between the parties. Wesco's subsequent issuance of an invoice containing different terms and conditions, despite its inclusion of a conditional assent clause, had no effect on the parties' preexisting agreement.[1]

Although the trial court correctly held that the August 8, 2002, purchase order constituted the contract, we believe it erred by ruling that the terms of the

[1] Wesco's reliance on *Power Press Sales Co v MSI Battle Creek Stamping*, 238 Mich App 173; 604 NW2d 772 (1999), is misplaced, as that case addressed issues under the UCC, which is inapplicable to this case.

indemnity clause of that contract applied to an act and injury occurring before August 8, 2002.

"This Court construes indemnity contracts in the same manner it construes contracts generally." *Badiee v Brighton Area Schools*, 265 Mich App 343, 351; 695 NW2d 521 (2005). "An unambiguous contract must be enforced according to its terms." *Id*. (quotation marks and citation omitted). "If indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties." *Id*. "While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee," *id*. at 352 (quotation marks and citation omitted), that principle only applies if the contract is ambiguous. *G-Tech Professional Staffing, Inc, supra* at 187. Whether a contract is ambiguous is a question of law for the court to decide. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).

In arguing that the indemnification provision cannot be applied retroactively, Wesco correctly notes the general rule that a contract "cannot be construed to operate retrospectively," *In re Slack Estate,* 202 Mich App 627, 629; 509 NW2d 861 (1993), unless, of course, the parties expressly provide so in their agreement. See *Hyatt v The Grover & Baker Sewing Machine Co*, 41 Mich 225, 227; 1 NW 1037 (1879) (holding that surety contract would only apply prospectively unless the contract specified differently); *Brockway v Petted*, 79 Mich 620, 626; 45 NW 61 (1890) (surety contract only applies to future events unless otherwise provided in contract); *Watson Wyatt Corp v SBC Holdings, Inc*, 438 F Supp 2d 746, 750-751 (ED Mich, 2006) (applying Michigan law), rev'd in part on other grounds 513 F3d 646 (CA 6, 2008). These decisions are entirely consistent with the principle that it is the contract language

freely agreed to by the parties that controls. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Thus, we again turn to the indemnity language chosen by the parties.[2]

The indemnification provision in Chrysler's purchase order provides, "Seller . . . shall protect, defend, hold harmless, and indemnify DaimlerChrysler from and against any and all loss . . . arising out of or related to the performance of any work in connection with this contract." This plain and unambiguous language makes clear that indemnification applies only to any loss that is related to work performed in connection with the August 8, 2002, contract. That contract required labor and material to be supplied for repair of the capacitor bank, and all of that work was started and completed after August 8, 2002. Obviously, the Stephens injury occurred well before the contract was formed (indeed, even before an offer was even made), and was not related to the work performed on the capacitor bank. Consequently, Stephens's injury was not covered by the indemnity clause.

DaimlerChrysler relies on *G-Tech Professional Staffing, Inc, supra*, as well as several unpublished, nonprecedental decisions,[3] in support of its argument that the indemnity clause covered Stephens's precontract injury. But all *G-Tech* recognized is that the words

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[2] Although neither relevant nor necessary to our decision under Michigan law, we note in passing that the rule in Michigan is consistent with that in several other states. See, e.g., *Pena v Chateau Woodmere Corp*, 304 AD2d 442, 443-444; 759 NYS 2d 451 (2003) (indemnity provision does not apply to injury that occurred before effective date of contract unless explicitly stated); *Service Merchandise Co v Hunter Fan Co*, 274 Ga App 290, 296-297; 617 SE2d 235 (2005) (same conclusion under Georgia law), and *Servco Pacific Inc v Dods*, 193 F Supp 2d 1183, 1193 (D Hawaii, 2002) (Hawaiian law).

[3] See MCR 7.215(C)(1).

"related" and "connecting" within an indemnity provision required an expansive reading of what was "related" or "connected" to the work performed under the contract. See *G-Tech Professional Staffing Inc, supra* at 186-187.[4] That conclusion, however, does not assist us in resolving the issue presented here. It is one thing to decide whether an injury occurring *during* the term of the contract falls within the contract's coverage language, but it is quite another to decide whether a party has agreed to indemnify another for an injury that occurred *before* the indemnity provision was agreed upon. Hence, unlike in *G-Tech*, where the Court was addressing whether a postcontract injury was related to the work performed under the contract, we must look to whether the parties provided language that shows an intent to require indemnification for *precontract* activity. As we have explained, there is no such language, and Stephen's precontract injury is not covered by the indemnity provision.

Reversed and remanded for entry of a judgment in favor of Wesco. We do not retain jurisdiction.

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[4] We also point out that the injury caused in *G-Tech* occurred after formation of the contract. See *id*. at 187.

YPSILANTI CHARTER TOWNSHIP v KIRCHER

Docket No. 277922. Submitted September 9, 2008, at Lansing. Decided October 9, 2008, at 9:00 a.m.

Ypsilanti Charter Township brought an action in the Washtenaw Circuit Court against David Kircher that included a nuisance-abatement count related to the discharge of raw sewage and numerous violations of township codes at the Eastern Highlands apartment complex, which Kircher owned. The court, David S. Swartz, J., declared the apartment complex a public nuisance and entered a series of orders relating to abatement of the nuisance. The court eventually appointed Barnes & Barnes as receiver for the property. After Judge Swartz disqualified himself, the case continued before Donald E. Shelton, J. The receiver moved for payment of the expenses it incurred repairing the property and remedying the violations. The court ordered Kircher to pay the receiver and granted the receiver a lien on the property. The payment ordered included a 25 percent markup on labor, materials, and supplies. Kircher did not pay the receiver, and a judicial sale of the property followed, with the receiver purchasing the property. The court confirmed the judicial sale, concluding that it had properly ordered a judicial lien in the receiver's favor because a receiver may be compensated out of funds and property in a court's custody and that the receiver had been entitled to foreclose the lien. The court also ordered Kircher to pay the township's costs and attorney fees. Kircher appealed.

The Court of Appeals *held*:

1. Sufficient evidence existed for the trial court to declare the apartment complex a public nuisance. The raw-sewage discharge and contamination, along with the fire-code violations that Kircher stipulated, posed clear and immediate risks to the general health, safety, and welfare.

2. Placement of the apartment complex into receivership was not an unconstitutional taking of Kircher's property without just compensation. Because the apartment complex constituted a public nuisance, the trial court was constitutionally authorized to take steps toward abating the nuisance conditions. Under the nuisance exception to the prohibition of unconstitutional takings, compen-

sation is not necessary when the plaintiff exercises its legitimate police power to abate a public nuisance on the defendant's property.

3. The trial court did not abuse its discretion by appointing a receiver. While appointment of a receiver is a remedy of last resort, it is appropriate when other attempts have failed and a property owner has repeatedly refused to comply with the court's orders.

4. The trial court abused its discretion by appointing a receiver that was not disinterested and by delegating to the township the responsibility of choosing the receiver. The power to appoint a receiver belongs exclusively to the circuit court. Since the receivership has already been dissolved, however, there is no lasting error that can be remedied on appeal.

5. The trial court did not abuse its discretion by ordering Kircher to pay all costs related to the cleanup and remediation of the raw-sewage contamination, the repair and correction of the fire-code violations identified, and the repair and abatement of any property-maintenance-code violations that actually caused or contributed to the public nuisance.

6. The trial court abused its discretion by ordering the receiver to do anything necessary to make the premises economically viable and by ordering Kircher to pay costs unrelated to the repair or abatement of actual nuisance conditions. The mere fact that a condition violates a local ordinance does not make it a public nuisance. A trial court cannot enjoin or order abatement of such a condition unless it is independently established that the condition constitutes a nuisance. To prove that a condition is a nuisance in fact, it is generally necessary to establish that the condition is harmful to the public health, safety, morals, or welfare. With regard to some of the expenses approved in this case, the trial court must determine on remand whether the repair or expenditure was necessary to abate an actual nuisance condition and, if so, whether the expense was reasonable and justified.

7. Receivers have a right to compensation for their services and expenses, but a receiver's specific rate of compensation must be reasonable and not excessive. The 25 percent markup the trial court awarded was excessive.

8. The trial court erred by granting the receiver a lien against the apartment complex in the amount of the judgment, allowing the receiver to foreclose that lien, and confirming the judicial sale of the property. A circuit court may abate a public nuisance at the property owner's expense. Moreover, a receiver's fees and compensation may be paid from the property or funds in receivership. No

authority exists, however, for a court to impose a lien on real property to secure the amount incurred to abate a general public nuisance under MCL 600.2940 or to secure fees and compensation due a receiver. Costs incurred to abate a public nuisance under MCL 600.2940 must be collected in the same manner as damages and costs are collected on execution. MCL 600.6004 provides that executions against real property may occur only after execution has been made against the personal property of the judgment debtor, which the receiver did not do in this case. A judgment for unpaid fees and compensation due a receiver must also be collected in the same manner as damages and costs are generally collected on execution. The receiver is not entitled to an equitable lien because it has an adequate remedy at law. Moreover, the lien imposed in this case did not qualify as a judgment lien.

9. The trial court did not abuse its discretion by granting the township attorney fees. The township incurred substantial legal expenses as a result of Kircher's unlawful conduct.

Affirmed in part, vacated in part, and remanded for further proceedings.

1. NUISANCE — ABATEMENT OF NUISANCES — CONSTITUTIONAL LAW — TAKINGS — JUST COMPENSATION — POLICE POWERS.

The exercise of legitimate police power to abate a public nuisance is an exception to the constitutional prohibition against taking private property for public use without just compensation (US Const, Am V; Const 1963, art 10, § 2).

2. LIENS — REAL PROPERTY — NUISANCE — ABATEMENT OF NUISANCES — AUTHORITY OF COURTS.

A court may not impose a lien on real property for the purpose of securing the amount incurred to abate a general public nuisance; costs incurred to abate a general public nuisance must be collected in the same manner as damages and costs are generally collected on execution (MCL 600.2940[4], 600.6001 *et seq.*).

3. LIENS — REAL PROPERTY — RECEIVERS.

A receiver is not entitled to a foreclosable lien in the amount of its outstanding fees and compensation; a judgment for unpaid fees and compensation due a receiver must be collected in the same manner as damages and costs are generally collected on execution (MCL 600.6001 *et seq.*).

McLain & Winters (by *Dennis O. McLain* and *Angela B. King*) for Ypsilanti Charter Township.

George E. Ward for David Kircher.

Roberts and Freatman (by *Ellis B. Freatman, III*) for Robert Barnes.

Before: CAVANAGH, P.J., and JANSEN and KELLY, JJ.

JANSEN, J. Defendant, David Kircher, appeals by right the circuit court's order confirming the judicial sale of his property, commonly known as the Eastern Highlands apartment complex (Eastern Highlands), to receiver Robert Barnes.[1] Defendant contends that the circuit court erred by granting the receiver a lien against Eastern Highlands, by allowing the receiver to foreclose that lien, and by confirming the subsequent judicial sale of Eastern Highlands to the receiver. In addition, defendant contends (1) that the circuit court erred by determining in the first instance that there were nuisances in need of abatement at Eastern Highlands, (2) that the circuit court unconstitutionally seized his private property without just compensation, (3) that the circuit court erred by appointing a receiver to abate the alleged nuisances, (4) that even if the receiver's appointment was proper, the circuit court nonetheless erred by approving several excessive and unnecessary expenditures by the receiver, (5) that the circuit court erred by granting attorney fees for plaintiff, and (6) that defendant's continued dispossession after the termination of the receivership constituted an additional unconstitutional taking of private property. We affirm in part, vacate in part, and remand this matter for further proceedings consistent with this opinion.

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[1] Robert Barnes was not the receiver himself, but was instead the authorized representative of receiver Barnes & Barnes. Nonetheless, for purposes of convenience, we refer to him informally as the receiver throughout this opinion.

I

On or about October 13, 2004, Washtenaw County authorities discovered that there had been a sewage backup at Eastern Highlands and that defendant or his agents were pumping raw sewage from a containment area into a storm drain or catch basin that eventually led to the Huron River. After being contacted by the authorities, plaintiff sent its building director and plumbing inspector to Eastern Highlands on October 14, 2004. Plaintiff's officials informed defendant that his sewage-pumping operation was illegal, but it does not appear that defendant immediately stopped the pumping.

Plaintiff filed a complaint and emergency petition on October 15, 2004, seeking a temporary restraining order to enjoin defendant from pumping the sewage and requesting an order to show cause why Eastern Highlands should not be condemned and declared a public nuisance. With the complaint, plaintiff filed the affidavit of its building director, Ronald Fulton, in which Fulton averred that irreparable harm would result if the court did not enjoin defendant's sewage-pumping operation. Later that day, the circuit court entered an ex parte temporary restraining order, enjoining defendant from pumping raw sewage and permitting plaintiff to enter the premises and abate any immediate dangers.

In response to the temporary restraining order, defendant shut off all water service to the tenants of Eastern Highlands. Plaintiff therefore filed an emergency motion seeking an ex parte order requiring defendant to restore water service to his tenants. On October 16, 2004, the circuit court entered an ex parte order requiring defendant to immediately restore water service to the tenants of Eastern Highlands and permitting plaintiff to abate any additional dangers that might

arise "in the event the restoration of water service . . . results in the threat of new sewage discharge . . . ." A hearing was set for October 20, 2004.

At the October 20, 2004, hearing, several witnesses testified concerning the nature, extent, and severity of defendant's sewage discharge. Defendant admitted that he had been aware that his employees were pumping raw sewage into a storm drain or catch basin and acknowledged that he was the sole owner of Eastern Highlands. Upon conclusion of the hearing, the court ruled:

> [T]he conduct of Defendants David Kircher and Eastern Highlands in failing to provide adequate sanitary sewage discharge facilities and discharging raw sewage into a storm drain, located on or near its property, which storm drain empties into the Huron River, constitutes an immediate clear and present danger to the health, safety, and welfare, of not only the residents of Defendants' apartments, but to the public at large.

The circuit court declared Eastern Highlands a public nuisance and directed plaintiff to take all reasonable steps to abate the nuisance caused by the sewage backup and defendant's sewage-pumping operation. Among other things, the court permitted plaintiff to inspect "all common areas, storage rooms, maintenance rooms, power plants, unoccupied apartment units, and occupied units with permission of [the] occupants, for contamination," to oversee "the immediate cleanup of any and all unsanitary conditions," to evacuate any areas or units in which "the contamination constitutes an immediate health hazard to the occupants," and to "prohibit further occupancy of the [a]ffected units or buildings until the health hazard has been removed." The court ordered defendant "to pay Plaintiff its costs and attorney's fees . . . incurred in bringing and enforc-

ing this matter, subject to Court review of the reasonableness thereof" and noted that it would "[c]onsider ordering the appointment of a receiver for the property" if defendant did not comply with the terms of the order.[2]

On October 26, 2004, plaintiff filed an amended complaint, adding a count entitled "Public Nuisance, Fire, and Property Maintenance Code Violations." Plaintiff alleged that a fire had occurred in Building M at Eastern Highlands on October 22, 2004, and that firefighters had discovered several fire code violations at the premises, including the absence of smoke detectors and fire extinguishers and the absence of an operational fire hydrant on the premises. Plaintiff also alleged that its officials had inspected Eastern Highlands and had discovered numerous property maintenance code violations in several of the buildings and the common areas. Among other things, these alleged property maintenance code violations included inoperable doors, improper or broken doorjambs, inoperable thermostats, walls that were not caulked and that had separated from the abutting structure, leaking faucets, a bathtub that was not properly caulked, toilets that were broken or not properly attached to the floor, many doors and windows that were not weathertight, an improperly installed heater cover, holes in the drywall, a loose window that posed a danger of falling, trash and garbage strewn throughout the hallways, deteriorated roof shingles, missing roof flashing, numerous missing doors and windows, the presence of rodents and insect

[2] Defendant was subsequently charged with and convicted of discharging a dangerous substance into the waters of this state, MCL 324.3115(2) and (4). He was sentenced to five years in prison and was ordered to pay a $1 million fine. This Court has recently affirmed defendant's convictions and sentence. *People v Kircher*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2008 (Docket No. 275215).

pests, defective stairways and handrails, inoperable locks, unsafe sidewalks and parking areas, exposed electrical wiring, disconnected vents in the laundry room, and washing machines that drained onto the floor.

Plaintiff set forth specific citations of its property maintenance code for each of these alleged violations. Plaintiff also attached a diagram showing the exact location of each of the alleged violations. Plaintiff requested that the circuit court (1) "[d]eclare the subject property a public nuisance" because of violations of the Ypsilanti Charter Township fire code and property maintenance code, (2) "[o]rder the nuisance abated," (3) order the immediate installation of smoke detectors and fire extinguishers, (4) grant plaintiff the authority to enter and reinspect all interior and exterior areas of Eastern Highlands to ensure compliance with the applicable fire and property maintenance codes, (5) order defendant to pay plaintiff "all costs and attorney's fees incurred by [plaintiff] in the enforcement" of the fire and property maintenance codes, and (6) "in the event Defendants fail or refuse to pay such costs, allow [plaintiff] a Judicial Lien in the full amount of its expenses incurred, plus interest, which Judicial Lien may be filed with the Washtenaw County Register of Deeds and be foreclosed . . . ."

The same day, the circuit court entered an order directing defendant to appear at a hearing to show cause why the court "should not enter an Order declaring the property . . . [a] public nuisance" for the reasons stated in plaintiff's amended complaint. At the hearing, plaintiff's counsel presented a prepared order and remarked that he and defendant had agreed to its terms. Defendant agreed with the language of the proposed order as it related to the alleged fire code violations and

acknowledged that the fire code applied equally to the occupied and unoccupied apartment units at Eastern Highlands. Defendant also indicated that he "would have no problem" with the portion of the proposed order that dealt with violations of the property maintenance code "as long as it refers to occupied units . . . ." Defendant apparently did not believe that the property maintenance code applied to unoccupied units and indicated that he was "not sure that the Property Maintenance Code requires all units in every building . . . to be ready for occupancy at all times even if [the units are] not for rent." He again conceded, however, that the fire code applied to occupied and unoccupied units alike, and also acknowledged that he had "no problem" with the proposed order as it related to "major violations" that affect the safety and integrity of the structure. Defendant indicated that he would agree to the proposed order as long as he could retain the right to object in the future to any of the alleged property maintenance code violations. Plaintiff's counsel agreed to this.

Following the hearing, the circuit court issued the proposed order, which was entitled "Order to Abate Nuisance." The order declared Eastern Highlands to be a public nuisance, directed defendant to immediately install the required smoke detection and fire suppression equipment in his buildings, directed defendant to install the necessary fire hydrant in full working order, and ordered defendant to promptly "complete all repairs as required to those addresses listed in the Township's inspection reports . . . ." The court authorized plaintiff's officials to enter and reinspect the premises in order "to determine compliance with the installation of the smoke detectors and fire extinguishers as required above" and in order to ensure compliance with plaintiff's fire code and property maintenance code

generally. The court scheduled a review hearing and noted that it would consider the issue of costs and attorney fees at a later date. The court observed that if defendant failed to comply with the order, it would "consider the request . . . to appoint a receiver to arrange for and oversee the completion of all required repairs and installations at Defendant's expense."

At a subsequent review hearing, plaintiff's officials testified that defendant had not complied with the terms of the court's order, that he was still not in compliance with the township's fire and property maintenance codes, and that defendant had not cleaned up or remediated the soil that had been contaminated by the initial sewage discharge. Testimony indicated that defendant had not installed the required smoke detectors or fire extinguishers and had not installed the missing fire hydrant. Plaintiff's building director also testified about his concern that one of the walls at Eastern Highlands had deteriorated and was in danger of immediate collapse.

Following another review hearing, the circuit court entered an "Order for Continuing Nuisance Abatement," finding that defendant had "not completely cooperated or complied with the previous orders of this Court." The court denied plaintiff's requests for the appointment of a receiver and to hold defendant in contempt. The court again ordered defendant to install the missing fire hydrant, ordered defendant to clean up and remediate the contaminated substrate in the area of the storm drain, ordered defendant to complete a videotaped inspection of the sewage lines at Eastern Highlands, directed defendant to fix a previously identified broken window that posed an imminent danger of falling, and ordered defendant to repair the brick wall of Building E that was in danger of imminent collapse.

The court gave defendant specific time frames in which to complete these required repairs and installations. The court also ordered that all occupied units at Eastern Highlands "shall be brought into compliance as required in the Notices of Violation" that plaintiff's officials had issued to defendant earlier. The court noted that it "will not hesitate" to hold defendant in contempt or to appoint a receiver "in the future should this Court find Defendant not to be in compliance with this or any other orders . . . ."

Following yet another hearing, the circuit court entered an "Order Finding Defendant David Kircher in Contempt of Court and for Continued Nuisance Abatement." The court found that defendant still had not completed any of the required repairs and installations, ordered defendant to spend three days in jail for contempt of court, and scheduled an additional review hearing. The court noted that if defendant was not in compliance with the court's orders as of the date of the next hearing, "the Court will most likely appoint a receiver as Plaintiff requests."

At a review hearing in December 2004, the circuit court heard testimony from several of plaintiff's officials and from defendant himself. The testimony established that defendant still had not installed the missing fire hydrant, that defendant had not produced video footage of the sewer line, that defendant had not remediated the contaminated soil, that defendant had not repaired the collapsing wall at Building E, that defendant had not repaired the window that was in danger of falling, that defendant had not fixed or repaired any of the other conditions listed in the "Notice of Violations" that he had earlier received, and that defendant had not fully cooperated with plaintiff's requests to enter the premises for the purpose of

conducting inspections. Following the hearing, the circuit court entered an "Order for Continuing Nuisance Abatement and for Appointment of Receiver," which provided:

> [A]s a result of [defendant's] continuing refusal to obey the orders of this Court, which refusal has continued to jeopardize the health, safety, and welfare of the residents of Plaintiff Charter Township of Ypsilanti and the occupants of Defendant's premises by exposing them to violations of State and local fire codes, Plaintiff's Property Maintenance Code, and continued exposure to raw sewage contaminants, McKinley Properties or such other party as the township shall choose shall be and hereby is appointed Receiver over Defendant's property, Eastern Highlands Apartments. To serve until such time as the public nuisance has been abated or the further order of this court.

The order stated that "the Receiver shall attempt to make the premises economically viable, if possible, and shall maintain detailed records of the costs for time and material expended in furtherance of its appointed tasks." The order also provided that "upon completion of repairs, the Receiver is granted a lien against the subject property for all fees and cost invoices which have not been paid by Defendant Kircher." Finally, the order provided that defendant would be required to "reimburse Plaintiff its costs and attorney fees incurred in conjunction with obtaining Defendant's compliance with [plaintiff's] codes and ordinances in this action."

Following entry of the circuit court's December 2004 order, defendant hired an attorney, who filed objections and moved for reconsideration. The court entered an "Amended Order" on January 19, 2005, that more precisely defined the duties and responsibilities of the receiver. The amended order also provided that "in the event McKinley Properties is not willing to perform under this order, Plaintiff may return to this Court for

the appointment of an alternative receiver or such other relief as may be appropriate."

On January 25, 2005, plaintiff filed a "Motion for Appointment of Alternate Receiver," asserting that it had learned that "McKinley Properties does not wish to act as receiver under the terms and conditions of the order" and asking "that Barnes & Barnes be appointed receiver over the properties known as Eastern Highlands Apartments . . . ." Defendant opposed the appointment of Barnes & Barnes and argued that no receiver was necessary in this case.

In early February 2005, the circuit court entered an "Order Appointing Alternate Receiver," specifying that "Barnes & Barnes shall be, and hereby is appointed receiver over [defendant's] property, which is the subject matter of this lawsuit (a.k.a. Eastern Highlands Apartments) to act subject to and in accordance with the Court's order entered January 19, 2005, which expressly defines the duties and obligations of the receiver." The court also ordered that regular hearings would be held "to determine if charges are appropriate & reasonable for the court ordered repairs."

Also in early February 2005, the circuit court granted a preliminary injunction, enjoining defendant from evicting any of the tenants of Eastern Highlands and ordering defendant to "stay off Eastern Highlands property until further order except to remove his personal belongings immediately . . . ."

Defendant moved for reconsideration of the order appointing Barnes & Barnes as the alternative receiver, but the court denied the motion.

The circuit court held additional review hearings in early and mid-2005 and approved several of the receiver's expenses and invoices. The court also denied defendant's motion to terminate the receivership. Then, in

August 2005, Washtenaw Circuit Judge David Swartz disqualified himself from this case, and the matter was reassigned to Washtenaw Circuit Judge Donald Shelton.[3]

Judge Shelton held an extensive review hearing in early February 2006 for the purpose of reviewing the receiver's expenditures and invoices from May 2005 through December 2005. The court heard testimony from plaintiff's building director and from Robert Barnes, Jr., the representative of receiver Barnes & Barnes. The court also reviewed photographs of Eastern Highlands and admitted the receiver's invoices into evidence. The following day, the court heard the testimony of defendant Kircher himself. Defendant explained how he would have repaired or corrected several of the code violations at Eastern Highlands and testified that many of the repairs would have cost him less than the receiver had expended to perform the same jobs. Defendant admitted that although he had purchased a new fire hydrant for Eastern Highlands, he had never installed it as the court had ordered. Otherwise, defendant presented no additional testimony or evidence concerning the propriety or reasonableness of the receiver's expenditures.

The receiver then moved for payment and to terminate the receivership. On April 19, 2006, the circuit court entered a detailed "Opinion and Order and Findings of Fact and Conclusions of Law Regarding Receiver's Motion for Payment." The court summarized the background of the case and observed that it had taken extensive evidence and testimony at the various review hearings. The court ruled:

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[3] Judge Swartz explained that he was not actually biased against defendant, but noted that he would disqualify himself in order to avoid the appearance of bias or impropriety.

[T]he charges sought by the receiver from May 2005 through December 2005 are reasonable and necessary and subject to payment from the Defendant. The improvements made were necessary to remedy code violations and/or remediate hazards to human life as evidenced by the testimony of the Building Inspector Ronald Fulton. Mr. Fulton's testimony was clear that prior to the appointment of a receiver his access to these buildings [at Eastern Highlands] and the specific units was obstructed by the defendant. After [Fulton] was permitted unfettered access into the buildings, he found a multitude of code violations. He testified that he spent a significant amount of time inspecting and re-inspecting the buildings. All of these inspections [revealed the need for] additional repairs to remedy the code violations. Therefore the receiver was charged with remedying the initial code violations and the newly discovered violations.

The repairs included the necessity of replacing all of the windows in the apartment buildings, repairing a significant amount of the plumbing, repairing the electrical wiring, and completing structural repairs of the walls which included dry walling of many units. In addition, many of the bathrooms in the units needed new equipment and a majority of units needed new kitchen equipment. The units were in such disrepair that demolition work was a necessity. Many of the entry doors to the units as well as doors within the units had to be replaced. The carpet and padding was so bad that it had to be removed in many of the units and was replaced in some of the units. The receiver completed necessary structural repairs to the exterior of the building[s] including removal of deteriorated steps and walkways, removal of fencing and fence poles, and repairing chimneys and building mortar. The receiver also rented tens of dumpsters simply to remove accumulated debris and other unhealthy materials from the uninhabitable units and paid the costs of removal. The receiver then had to pay for the materials and labor to have those buildings boarded up to prevent further deterioration and potential liability. The receiver has expended great sums of money on permits, utility bills, maintenance,

eviction proceedings, and other legal proceedings. The receiver is entitled to reimbursement of all these fees which this Court finds were reasonable and necessary.

The Court also finds that the 25% markup fees are allowed based on Judge Swartz' April 22, 2005 Order . . . . This Court agrees with Judge Swartz' rationale for allowing these markups . . . .

* * *

Therefore, the Court orders that Defendant shall pay the initial $150,401.82 which was ordered to be paid by Judge Swartz and shall pay the additional $1,552,078.88 hereby approved by this Court. The total amount owed to the Receiver is $1,702,480.70. Payment is due forthwith and the receiver is granted a lien in that same amount.

The Court agrees with plaintiff that the terms and conditions of the receiver's appointment should be modified. The Court therefore orders that the receivership as to buildings E, F, G, H, J, K, L, and M is terminated. The cost of bringing these buildings up to code far exceeds the value of the buildings. These buildings have already been secured and boarded up and shall remain secured and boarded up. Water and gas to these buildings shall not be resumed without further order from this Court. The receiver's request to fence off this portion of the premises to prevent unauthorized access is also GRANTED.

The receivership for buildings A, B, C, D, N, P, and R, all of which are situated closest to LeForge Road is also terminated. The Court finds that the receiver has brought these buildings up to code and remediated the soil contamination and sewage discharge. A receivership is no longer necessary to protect the interest of the public or the tenants currently leasing those premises.

The Receiver's request to be appointed property manager for the apartment complex is GRANTED but limited to the 180 days following entry of this order.

Following the circuit court's ruling of April 19, 2006, plaintiff moved for reimbursement by defendant of its

costs and attorney fees incurred in this action. The motion stated that the "total costs and attorney fees incurred by Plaintiff in this action to date are $60,057.72." Further, the receiver filed a "Motion for Continued Exclusive Possession" of the Eastern Highlands premises. The circuit court entered an order providing that "Defendant David Kircher shall be prohibited from having any direct contact with the tenants at Eastern Highlands . . . ."

The receiver then filed a "Motion for Order to Sell Real Property," arguing that defendant had not paid the outstanding $1,702,480.70 and asking the court to order a judicial sale of the premises in order to raise the amount that was owing and due. Defendant responded by arguing that the receiver's lien was a judgment lien and could not be foreclosed. Defendant also argued that any sale of Eastern Highlands had to conform to the procedural requirements for selling real estate on execution.

In September 2006, the circuit court granted plaintiff's motion for costs and attorney fees. The court ordered defendant to pay plaintiff "the sums of $48,614.82 for attorney fees and $12,935.40 in costs, within 30 days of this Order. In the event defendant fails to pay such amounts, a lien shall be granted against the property at issue." The circuit court also ruled:

> The receiver in this case has petitioned the court to allow the property to be sold. The receiver and the plaintiff have a dispute as to lien priority. The court finds that the issue [concerning lien priority] is not ripe for decision and must be brought if, and when, the property is sold. However, the Court finds that the receiver may sell the property 30 days from the date of this order if all receivership payments, attorney fees and costs have not been paid.

After 30 days, when defendant still had not paid the receiver, the receiver commenced proceedings to sell the property. A judicial sale was conducted on November 30, 2006. The receiver was the only bidder and submitted a bid in the amount of $2,344,586.10. This amount included the $1,702,480.70 lien amount, as well as interest, taxes in the amount of $336,663.55 paid to prevent a tax foreclosure, utility expenses in the amount of $43,457.39, and other costs incurred by the receiver for maintaining the property between January 1, 2006, and the date of the sale. A sheriff's deed was executed, conveying absolute title to the property to the receiver pending a judicial confirmation of the sale.

On April 20, 2007, the circuit court entered an order "Confirming Judicial Sale." The order provided that the receiver's lien

> was not a judgment lien pursuant to . . . MCL 600.2801 through MCL 600.2819. Defendant erroneously cites authority from the judgment foreclosure statutes in the Revised Judicature Act. The authority cited by defendant does not apply in this case. The lien in this case was ordered to protect the interest of the receiver pending the sale of the property.

The circuit court acknowledged that "courts may not create or impose a lien on real property absent an express agreement by the parties or other legal authority." However, the court nonetheless concluded that it "had legal authority to order a judicial lien in favor of the receiver in this matter" because "a receiver may be compensated out of funds or property in [the court's] custody." The court observed that defendant had not paid the receiver and that the receiver had consequently been entitled to foreclose its lien. The court granted the receiver's motion to confirm the judicial sale of the property. Thereafter, the circuit court again

ordered defendant to pay plaintiff's costs and attorney fees incurred in this matter, in the amount of $61,550.22 plus interest.

II

Defendant argues that the circuit court erred by declaring in the first instance that Eastern Highlands was a public nuisance. Plaintiff responds by arguing that there were conditions at Eastern Highlands that threatened the general health, safety, and welfare and that defendant actually stipulated to the circuit court's original order that detailed the nuisance conditions existing at Eastern Highlands.

A

Whether an allegedly injurious condition constitutes a nuisance per se[4] is a question of law. *Huang v Wildbrook Apartments*, 62 Mich App 340, 342-343; 233 NW2d 276 (1975); see also *Brown v Nichols*, 337 Mich 684, 689; 60 NW2d 907 (1953). However, whether an allegedly injurious condition constitutes a nuisance in fact[5] is a question of fact. *Brown,* 337 Mich At 689; see also *Beard v Michigan*, 106 Mich App 121, 124; 308 NW2d 185 (1981). " 'The difference between a nuisance *per se* and one in fact is not in the remedy but only in

[4] A nuisance per se is also known as a nuisance at law. *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959). " 'A nuisance at law or a nuisance *per se* is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.' " *Id*. (citation omitted).

[5] A nuisance in fact is also known as a nuisance per accidens. *Bluemer*, 356 Mich at 411. " 'Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property.' " *Id*. (citation omitted).

the proof of it.' " *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959) (citation omitted).

Nuisance-abatement proceedings brought in the circuit court are generally equitable in nature. MCL 600.2940(5). We review de novo the circuit court's equitable decisions, but review for clear error the findings of fact supporting those decisions. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004).

B

Before the circuit court could take cognizance of plaintiff's complaint for nuisance abatement pursuant to MCL 600.2940, it was first required to determine that there was a nuisance in need of abatement. We conclude without difficulty that the raw sewage discharge and contamination at Eastern Highlands did indeed constitute a public nuisance. This condition was dangerous to human life. It imperiled the health, safety, and welfare of the tenants of Eastern Highlands and the other nearby residents. See *Bronson v Oscoda Twp (On Second Remand)*, 188 Mich App 679, 684; 470 NW2d 688 (1991). Beyond this, defendant stipulated the fact that the fire code violations identified at Eastern Highlands created a public nuisance. Defendant acknowledged in open court that he had no objections to that portion of the proposed order dealing with the identified fire code violations, and defendant conceded that the fire code applied to occupied and unoccupied units alike. A stipulation entered in open court is generally binding on the parties. *Kline v Kline*, 92 Mich App 62, 79; 284 NW2d 488 (1979). Thus, to the extent that the circuit court's original order was based on the raw sewage release and contamination and the identified fire code violations, it was proper. These conditions posed clear

and immediate risks to the general health, safety, and welfare. The circuit court did not err by declaring Eastern Highlands a public nuisance on these grounds. See *Bronson*, 188 Mich App at 684.

Contrary to plaintiff's position on appeal, defendant did not stipulate that the identified property maintenance code violations at Eastern Highlands created a public nuisance. The record reveals that defendant indicated that he would agree to the proposed order only as long as he could retain the right to object in the future to any of the alleged property maintenance code violations specified in the order. Plaintiff's counsel specifically agreed to this request by defendant. However, this does not change the fact that Eastern Highlands was properly declared a public nuisance by virtue of the sewage contamination and the fire code violations alone. Even in the absence of the property maintenance code violations, there still would have been sufficient evidence for the circuit court to declare Eastern Highlands a public nuisance.

III

Defendant next argues that the circuit court's placement of Eastern Highlands into receivership was an unconstitutional taking of his private property. We disagree.

A

We review constitutional issues de novo on appeal. *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

B

Contrary to defendant's assertions, Eastern Highlands constituted a public nuisance, and the circuit

court was therefore constitutionally authorized to take steps toward abating the nuisance conditions. Defendant disregards the well-established nuisance exception to the prohibition of governmental takings. The federal and state constitutions both proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000).[6] However, the nuisance exception to the prohibition of unconstitutional takings provides that because no individual has the right to use his or her property so as to create a nuisance, "the State has not 'taken' anything when it asserts its power to enjoin [a] nuisance-like activity." *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 491 n 20; 107 S Ct 1232; 94 L Ed 2d 472 (1987). Indeed, "Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Id*. at 492 n 22. Because plaintiff was exercising its legitimate police power to abate the public nuisance on defendant's property, no unconstitutional taking occurred. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 555 n 22; 730 NW2d 481 (2007).

IV

Defendant next argues that the circuit court abused its discretion by appointing a receiver to abate the alleged nuisance conditions at Eastern Highlands and by appointing a receiver that was not disinterested. Again, we disagree.

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[6] The Taking Clause of the Fifth Amendment is substantially similar to the Taking Clause of the Michigan Constitution, *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001), and the two provisions should generally be interpreted coextensively, see *Peterman v Dep't of Natural Resources*, 446 Mich 177, 184 n 10; 521 NW2d 499 (1994).

A

We review for an abuse of discretion the circuit court's decision to appoint a receiver. *Id.* at 523. An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B

Defendant had been repeatedly warned of his responsibility to clean up and remediate the raw sewage contamination at Eastern Highlands, and he had also been directed on several occasions to correct the identified fire code violations on his property. Even after repeated warnings and requests, however, defendant continued to defiantly refuse to remediate or correct any of these identified nuisance conditions. We recognize that the appointment of a receiver is a remedy of last resort and should not be used when another, less drastic remedy exists. *Ypsilanti Fire Marshal*, 273 Mich App at 530; *Hofmeister v Randall*, 124 Mich App 443, 446; 335 NW2d 65 (1983). However, the appointment of a receiver is appropriate when other attempts have failed and a property owner has repeatedly refused to comply with the court's orders. *Ypsilanti Fire Marshal*, 273 Mich App at 523; *Band v Livonia Assoc*, 176 Mich App 95, 105; 439 NW2d 285 (1989) (stating that the "appointment of a receiver may be appropriate when other approaches have failed to bring about compliance with the court's orders"). We cannot conclude that the circuit court abused its discretion by appointing a receiver in this case.

C

Defendant also argues that the circuit court abused its discretion by appointing a receiver that was not

disinterested and by delegating to plaintiff the responsibility of choosing the receiver in this case. We agree, but conclude that there is no lasting error entitling defendant to relief in this regard since the receivership has already been dissolved. Robert Barnes, the representative of receiver Barnes & Barnes, testified during at least one of the hearings before the circuit court that he could not work with defendant and that he and defendant did not get along. We fully acknowledge that Barnes & Barnes had previously been appointed as the receiver for other properties owned by defendant and had committed several improprieties in other cases by failing to obtain the court's permission before starting costly projects and by charging defendant for questionable and unnecessary repairs. We also acknowledge that a circuit court may not delegate the responsibility of choosing a receiver to one of the parties. Indeed, the "power to appoint a receiver belongs exclusively to the circuit court." *Ypsilanti Fire Marshal*, 273 Mich App at 528. However, the receivership in the instant case has now been terminated, and Barnes & Barnes is therefore no longer the court-appointed custodian of Eastern Highlands. In light of this fact, we conclude that there is no lasting error that this Court can remedy. See *id*. at 529; see also *In re Contempt of Dudzinski*, 257 Mich App 96, 112; 667 NW2d 68 (2003) (holding that an issue has become moot when the court is no longer able to fashion a remedy for the controversy).

V

Defendant argues that even if the receiver's appointment was proper, the circuit court nonetheless erred by approving several excessive and unnecessary expenditures by the receiver. We agree in part.

A

The circuit court's determination concerning the propriety and reasonableness of a receiver's expenses is treated as presumptively correct because the circuit court "has far better means of knowing what is just and reasonable than an appellate court can have." *Kurrasch v Kunze Realty Co*, 296 Mich 122, 124; 295 NW 583 (1941). We therefore review for an abuse of discretion the circuit court's decision to approve or disapprove the individual expenses incurred by the receiver. *Id*. An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

B

The receiver was originally appointed for the purpose of abating the nuisance conditions at Eastern Highlands, and was initially directed by the circuit court to perform only the minimum necessary repairs. Nevertheless, the circuit court ultimately permitted the receiver to complete numerous repairs and projects that were in no way related to abating the original nuisance conditions for which the receiver had been appointed. This is demonstrated in part by the circuit court's December 2004 order directing that "the Receiver shall attempt to make the premises economically viable . . . ."

Unlike the nuisance-abatement action in *Ypsilanti Fire Marshal*, the present action was not based on Michigan's Fire Prevention Code, MCL 29.1 *et seq*. Instead, this action was based entirely on alleged violations of the local fire and property maintenance codes and was brought pursuant to Michigan's general nuisance-abatement statute, MCL 600.2940, only. Circuit courts have broad equitable authority to abate

nuisances under MCL 600.2940. *Ypsilanti Fire Marshal*, 273 Mich App at 527 n 12. However, before proceeding to abate a nuisance under the terms of MCL 600.2940, a court must naturally first determine that a nuisance actually exists.

"The word 'nuisance' has been variously defined and is so comprehensive that its existence must be determined from the facts and circumstances of each case." *Ebel v Saginaw Co Bd of Rd Comm'rs*, 386 Mich 598, 606; 194 NW2d 365 (1972). However, at its core, "[p]ublic nuisance includes interference with the public health, the public safety, the public morals, the public peace, the public comfort, and the public convenience in travel." *Bronson*, 188 Mich App at 684.

> The essential element of a nuisance is a wrongful, continuing, impending danger to the lives or health of the public, or to the legitimate property or personal rights of private persons peculiarly subject to the danger. A condition that is so threatening as to constitute an impending danger to the public welfare is a nuisance. [19 Michigan Civil Jurisprudence, Nuisances, § 1, pp 62-63.]

See also *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957) (listing cases describing various types of public nuisances).

The costs of clean up and remediation of the raw sewage contamination were necessary, as were the costs of repairing and correcting the identified fire code violations. The raw sewage contamination and the fire code violations constituted bona fide public nuisances because they endangered the general health, safety, and welfare of the tenants of Eastern Highlands. The circuit court did not abuse its discretion by ordering defendant to pay all costs related to the cleanup and remediation of the raw sewage contamination and all costs related to

the repair and correction of the identified fire code violations. *Kurrasch*, 296 Mich at 124.

Nor did the court abuse its discretion by approving the receiver's expenses incurred in the repair and abatement of those property maintenance code violations that actually caused or contributed to the public nuisance at Eastern Highlands. Code violations such as exposed live electrical wires, significant accumulations of trash and rubbish, insect and vermin infestations, falling bricks and windows, collapsing walls, and sanitary sewer leakages certainly posed substantial risks to the general health, safety, and welfare of the tenants of Eastern Highlands.[7] The circuit court acted within its discretion by approving the reasonable and necessary costs of repairing and correcting all serious property maintenance code violations of this nature.

Conversely, however, the court abused its discretion by ordering the receiver to do anything necessary "to make the premises economically viable" and by ordering defendant to pay costs that were unrelated to the abatement or repair of actual nuisance conditions. Many of the alleged property maintenance code violations at issue in this case were minor, did not immediately endanger the health and safety of the public or the tenants, and therefore did not cause or contribute to the public nuisance at Eastern Highlands. Code violations such as chipped paint, dripping faucets, improperly caulked bathtubs, improperly caulked windows, missing roof flashing, and small holes in the drywall simply did not rise to the level of public nuisance conditions. We fully recognize that these conditions constituted violations of the local property maintenance code. But the mere fact that a condition consti-

[7] This list is not intended as exclusive, but merely serves to provide examples of the types of major property maintenance code violations that constituted bona fide nuisance conditions in this case.

tutes a violation of a local ordinance does not make that condition a public nuisance, and the circuit court has no jurisdiction to abate or enjoin such a condition unless it is independently established that the condition constitutes a nuisance. See *Garfield Twp*, 348 Mich at 340; see also 58 Am Jur 2d, Nuisances, § 338, p 788 (observing that a court sitting in equity "will take jurisdiction when a violation or threatened violation of an ordinance amounts to a nuisance, not because the act is in violation of the ordinance, but because it is a nuisance").[8] Said another way, absent statutory authority for doing so, townships lack the power to classify violations of their ordinances as nuisances per se, and a court can therefore only enjoin such violations upon sufficient proofs that they constitute nuisances in fact. *Bane v Pontiac Twp*, 343 Mich 481, 494; 72 NW2d 134 (1955). To prove that a condition constitutes a nuisance in fact, it is generally necessary to establish that the condition is harmful to the public health, safety, morals, or welfare. See *Garfield Twp*, 348 Mich at 342.

We affirm the circuit court's approval of the initial $150,401.82 in expenses incurred by the receiver. The record establishes that these expenses, which were approved by both Judge Swartz and Judge Shelton, were necessarily incurred to abate bona fide nuisance conditions at Eastern Highlands. In contrast, the record simply does not provide sufficient detail to allow us to determine the appropriateness of the remaining $1,552,078.88, which Judge Shelton largely approved after the fact. Because we cannot

[8] It is true that certain violations of local ordinances enacted under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., are presumptively classified as nuisances per se. MCL 125.3407. However, the Ypsilanti Charter Township property maintenance code was not enacted under the Michigan Zoning Enabling Act.

determine the propriety of these remaining expenses on the record before us, we must remand this matter for further proceedings.

Before approving these $1,552,078.88 in expenses, the trial court was required to (1) determine whether each repair or expenditure was necessary to abate an actual nuisance condition and (2) then determine whether the expenses of abating that nuisance condition were reasonable and justified. Indeed, " '[t]o obtain approval by the court of an expenditure not previously authorized to be made, a receiver must show that the expense was a reasonable one . . . , that the amount paid is fair and reasonable, and that it has been actually paid in good faith.' " *Corell v Reliance Corp*, 295 Mich 45, 53; 294 NW 92 (1940) (citation omitted).

We vacate that portion of the circuit court's order that approves the receiver's expenditure of the remaining $1,552,078.88. We remand the case for a determination by the circuit court whether each property maintenance code violation in fact constituted an actual nuisance condition. If the circuit court properly finds on remand that a property maintenance code violation constituted an actual nuisance condition, then only the amount *reasonably and necessarily* incurred in correcting or abating that condition may be included in the corrected judgment amount. With respect to any property maintenance code violations that *did not* constitute actual nuisance conditions, the expenses incurred by the receiver must be *excluded* from the corrected judgment amount. To reiterate, it will be necessary for the court to disapprove and exclude from the total corrected judgment amount any expenses that were not reasonably and necessarily incurred by the receiver to abate or repair actual nuisance conditions at Eastern Highlands.[9] Only those expenses properly, reasonably,

[9] The charges incurred to correct the property maintenance code

and necessarily incurred to abate actual nuisance conditions at Eastern Highlands may be charged to defendant and included in the corrected judgment amount.

VI

Defendant next argues that the circuit court erred by allowing the receiver to charge a "25% mark-up on all expenditures." We agree.

A

We review for an abuse of discretion the circuit court's decision setting compensation for a receiver. *Fisk v Fisk*, 333 Mich 513, 517-518; 53 NW2d 356 (1952). An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

B

"Receivers have a right to compensation for their services and expenses . . . ." *Cohen v Cohen*, 125 Mich App 206, 215; 335 NW2d 661 (1983). However, a receiv-

violations *that did not independently constitute nuisance conditions* may not be included in the corrected judgment amount on remand. But this does not necessarily mean that the receiver may not collect the amounts reasonably and necessarily expended to repair or correct the non-nuisance code violations. On remand, and in the circuit court's discretion, the receiver may intervene and set forth a claim of quantum meruit for the amount of these otherwise-unrecoverable, non-nuisance-related expenses. In this way, the receiver might still collect from defendant any amounts reasonably and properly expended to fix or correct non-nuisance property maintenance code violations at Eastern Highlands. After all, defendant was under a duty to correct or repair these non-nuisance violations himself, and requiring the receiver to bear the expense of repairing these violations would result in defendant's unjust enrichment. See, e.g., *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 201; 729 NW2d 898 (2006).

er's specific rate of compensation must be reasonable and must not be excessive. *Id.*; see also *Fisk*, 333 Mich at 517-518. In the instant case, the circuit court allowed the receiver to charge a 25 percent markup on all labor, materials, and supplies. This was excessive, even in light of the circuit court's belief that the markup was necessary in order to attract a receiver to this particularly undesirable job. While we are disinclined to say definitively what amount of compensation would have been reasonable and justifiable, the 25 percent markup on all labor, materials, and supplies awarded in this case was simply too great. We vacate the circuit court's order allowing the receiver to charge a 25 percent markup on all labor, materials, and supplies.[10] We direct the circuit court to determine on remand a fairer and more reasonable amount of compensation for the receiver and to correct the amount of the judgment accordingly.

VII

Defendant also argues that the circuit court erred by granting the receiver a lien against Eastern Highlands in the amount of the judgment, by allowing the receiver to foreclose that lien, and by confirming the judicial sale of the property. We agree.

A

Whether a lien is authorized in a particular case is a question of law. We review questions of law de novo. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

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[10] This is not to say that a 25 percent markup on labor, materials, and supplies may not be warranted in other receivership matters. We simply conclude that a 25 percent markup was excessive in light of the unique and particular facts of this case.

B

It is true that the circuit court may abate a public nuisance at the expense of the property owner. MCL 600.2940(3); *Ypsilanti Fire Marshal*, 273 Mich App at 538. It is also true that a receiver's fees and compensation may be paid from the property or funds in receivership. *Fisk*, 333 Mich at 518; *In re Dissolution of Henry Smith Floral Co*, 260 Mich 299, 302; 244 NW 480 (1932). However, after reviewing the pertinent legal authority, we conclude that no lien on defendant's real property was authorized in this case.

The courts may not impose a lien on real property absent an express agreement of the parties or other legal authority. *Ypsilanti Fire Marshal*, 273 Mich App at 538. As this Court has previously observed, there is no legal authority allowing the circuit court to impose a lien on a property owner's realty for the purpose of securing the amount incurred to abate a general public nuisance under MCL 600.2940. *Ypsilanti Fire Marshal*, *supra* at 537.[11] Nor have we located any legal authority permitting the court to impose a lien on real property for the purpose of securing fees and compensation due a receiver. We acknowledge that unpaid receiver's fees

[11] As noted earlier, unlike the nuisance-abatement action in *Ypsilanti Fire Marshal*, the present action was not based on Michigan's Fire Prevention Code. Instead, this action was based entirely on Michigan's general nuisance-abatement statute, MCL 600.2940. It is true that liens are authorized under Michigan's Fire Prevention Code to secure the expenses of abating certain types of nuisances. MCL 29.16(1); *Ypsilanti Fire Marshal*, 273 Mich App at 537 n 17. Other specific statutes authorize liens for the expenses of abating particular nuisances as well. *Id.* at 537 n 18. However, none of these statutes is applicable in this case. There is quite simply no statute that authorizes liens for the expenses of general nuisance abatement under MCL 600.2940. Indeed, costs incurred to abate general public nuisances must be collected in the same manner as damages and costs are generally collected on execution. MCL 600.2940(4).

are in the nature of "administrative costs," which have first priority against the funds or property being held *in custodia legis*. *Henry Smith Floral*, 260 Mich at 302-303. But such "[a]dministrative costs are not at all of the nature of a lien . . . ." *Id*. at 302. We accordingly conclude that, although a court may first satisfy the administrative costs of a receivership out of funds actually held in the court's custody, a receiver is not entitled to a foreclosable lien in the amount of its outstanding fees and compensation.[12]

Costs incurred to abate general public nuisances under MCL 600.2940 must be collected in the same manner as damages and costs are generally collected on execution. MCL 600.2940(4); *Ypsilanti Fire Marshal*, 273 Mich App at 539. The procedure for collecting damages and costs on execution is described in chapter 60 of the Revised Judicature Act, MCL 600.6001 *et seq*. Under MCL 600.6004, executions against realty are permitted "only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered." Because the receiver in this case did not first attempt to satisfy the judgment by execution against defendant's personal property, it was not entitled to execute against defendant's realty. MCL 600.6004.

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[12] In *Henry Smith Floral*, the receiver's fees and compensation were readily payable out of funds raised through the foreclosure sale of an unrelated mortgage. Had the circuit court possessed similar liquid funds in the present case, the court could have simply paid the receiver's fees and compensation directly as an administrative cost rather than including the outstanding receiver's fees and compensation as an element of the judgment. See *Henry Smith Floral*, 260 Mich at 302. However, because the court in this case had no liquid assets from which it could directly pay the receiver's fees and compensation as an administrative cost, it was necessary for the court to enter a judgment for the receiver in the proper amount.

In the absence of any authority to the contrary, we similarly conclude that a judgment for unpaid fees and compensation due a receiver must be collected in the same manner as damages and costs are generally collected on execution. "Issuance of execution is the ordinary method of enforcing a legal or equitable judgment for the payment of money." 7 Michigan Pleading & Practice, Executions, § 49:1, p 304. Like the collection of costs incurred to abate public nuisances under MCL 600.2940, the collection of a judgment for unpaid receiver's fees and compensation must also proceed in accordance with chapter 60 of the Revised Judicature Act.

We note that the receiver was not entitled to an equitable lien in this case. "Equity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled." *Cheff v Haan*, 269 Mich 593, 598; 257 NW 894 (1934). A party that has an adequate remedy at law is not entitled to an equitable lien. *Yedinak v Yedinak*, 383 Mich 409, 415; 175 NW2d 706 (1970). Here the receiver had an adequate remedy at law—namely, execution against defendant's personal or real property pursuant to chapter 60 of the Revised Judicature Act. Therefore, no equitable lien was warranted on the facts of this case.

Nor did the lien imposed on defendant's real property in this case qualify as a judgment lien pursuant to chapter 28 of the Revised Judicature Act, MCL 600.2801 *et seq*. The circuit court expressly stated that the lien in this case was not intended as a judgment lien. Moreover, even if the court had intended the lien to comply with the provisions of chapter 28, judgment liens may not be foreclosed. MCL 600.2819.

We vacate the lien, which the circuit court imposed on defendant's realty notwithstanding the absence of

an express agreement of the parties or any other legal authority. It is true that we are generally disinclined to set aside a foreclosure and sale "in the absence of fraud, accident, mistake, or significant irregularities." *Ypsilanti Fire Marshal*, 273 Mich App at 535. In this case, however, the irregularities were substantial. They were not " 'mere technical irregularities,' " as have been found in other cases. *Carpenter v Smith*, 147 Mich App 560, 568; 383 NW2d 248 (1985), quoting *Madill v Michigan Nat'l Bank*, 302 Mich 251, 255; 4 NW2d 538 (1942). Instead, the irregularities at issue here were fundamental defects that went to the very validity of the purported lien itself. In short, the lien granted in favor of the receiver in this case was entirely unauthorized by law. And because the lien was void, "there was nothing upon which foreclosure proceedings could operate." *Fox v Martin*, 287 Mich 147, 153; 283 NW 9 (1938). We set aside the foreclosure and sale, and vacate the circuit court's order confirming the sale as well.[13]

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[13] After the circuit court determines a new and corrected judgment amount on remand, the receiver will first be required to attempt to execute that judgment against defendant's personalty. MCL 600.6004. The receiver will then be permitted to execute against defendant's realty, in accordance with the provisions of chapter 60 of the Revised Judicature Act, but "only after execution has been made against the personal property of the judgment debtor that is in the county, and such personal property is insufficient to meet the sum of money and costs for which judgment was rendered." *Id.* Any such execution against defendant's realty must conform exactly to the law governing the enforcement of judgments and may not proceed under the novel and erroneous "foreclosure" procedure concocted by the receiver and the receiver's attorneys. For instance, in the case of execution against defendant's realty, defendant must be afforded the right of redemption. MCL 600.6062. Also, in the case of execution against defendant's realty, any surplus proceeds remaining after satisfaction of the judgment must be paid over to defendant. MCL 600.6044. We are aware that property *in custodia legis* is not generally subject to execution. *Jensen v Oceana Circuit Judge*, 194 Mich 405, 411; 160 NW 620 (1916); see also 27 Michigan Law & Practice, Remedies, § 23, p 194. However, the receivership in this case has been

VIII

Plaintiff next argues that the circuit court erred by granting attorney fees to plaintiff. We cannot agree.

A

We generally review for an abuse of discretion a circuit court's grant of attorney fees. Findings of fact on which the court bases its award of attorney fees are reviewed for clear error; questions of law are reviewed de novo. *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.

B

"Michigan adheres to the general rule that attorney fees are not recoverable, either as an element of costs or as an item of damages, unless expressly authorized by statute, court rule, or a recognized exception." *Brooks v Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991). However, " '[r]ecovery has been allowed in limited situations where a party has incurred legal expenses as a result of another party's fraudulent or unlawful conduct.' " *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d 357 (2006), quoting *Brooks*, 191 Mich App at 575. Plaintiff was forced to incur substantial costs and attorney fees to prosecute this matter, which originally arose out of defendant's illegal and egregious discharge of raw sewage into a public storm drain. The matter then continued when defendant flaunted the circuit court's orders requiring

terminated, and defendant's property therefore will no longer be *in custodia legis* at the time of any future execution against it.

him to clean up and remediate the contaminated areas on his property, and when he refused to bring his buildings into compliance with applicable local ordinances. Plaintiff incurred substantial legal expenses as a result of defendant's unlawful conduct. *Spectrum Health,* 270 Mich App at 253. We cannot conclude that the circuit court's award of attorney fees for plaintiff fell outside the range of reasonable and principled outcomes. *Maldonado*, 476 Mich at 388.[14]

IX

Defendant lastly suggests that his continued dispossession after the dissolution of the receivership constituted an unconstitutional taking of private property. But as plaintiff points out in its brief on appeal, defendant has failed to brief the merits of this issue and has cited no authority in support of his assertion. An appellant may not simply announce a position on appeal and leave it to this Court to rationalize the basis for that claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Defendant's failure to properly address the merits of his assertion of error constitutes an abandonment of this issue on appeal. MCR 7.212(C)(7); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

X

We affirm the circuit court's order declaring Eastern Highlands to be a public nuisance. The discharge of raw sewage and the fire code violations at Eastern High-

[14] Defendant also appears to argue that the circuit court erred by granting costs for plaintiff. However, defendant has failed to brief this argument and has accordingly abandoned the issue on appeal. MCR 7.212(C)(7); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

lands endangered the public health, safety, and welfare. We similarly affirm the circuit court's appointment of a receiver to oversee and implement the process of nuisance abatement. Finally, we affirm the circuit court's specific award of costs and attorney fees for plaintiff, and we affirm the circuit court's approval of the initial $150,401.82 in expenses incurred by the receiver.

We vacate the circuit court's approval of the remaining $1,552,078.88 in expenses incurred by the receiver. We also vacate the circuit court's order allowing the receiver to charge a 25 percent markup on all labor, materials, and supplies. Finally, we vacate the lien imposed against defendant's real property, set aside the foreclosure and sale, and vacate the circuit court's order confirming the sale.

On remand, the circuit court shall (1) redetermine which property maintenance code violations constituted actual nuisance conditions at Eastern Highlands (i.e., separate the minor property maintenance code violations from those that actually endangered the general health, safety, or welfare)[15] and (2) determine whether the expenses of abating these actual nuisance conditions were reasonable and justified.[16] After this is completed, the circuit court shall calculate a new and corrected judgment amount, which shall include only (1) the initial $150,401.82 in expenses incurred by the

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[15] As noted previously, what constitutes a nuisance in fact is a question of fact. *Brown*, 337 Mich at 689. The establishment of a nuisance in fact generally requires some proof that a condition is dangerous to human life or that it otherwise imperils the general health, safety, or welfare. See *Bronson*, 188 Mich App at 684.

[16] We wish to make clear that the circuit court will not necessarily need to take new evidence on remand in order to comply with our directives. The circuit court "may utilize evidence and testimony already in the record and it need not duplicate such evidence and testimony." *Ypsilanti Fire Marshal v Kircher*, 480 Mich 910 (2007).

receiver, (2) any reasonable expenses of cleanup and remediation of raw sewage contamination that were not included in the initial $150,401.82, (3) any reasonable expenses incurred to abate actual fire code violations that were not included in the initial $150,401.82, (4) any reasonable and justified expenses of abating those property maintenance code violations that constituted actual nuisance conditions, (5) other necessary and reasonable amounts paid by the receiver for maintaining the property between January 1, 2006, and the date of the judicial sale, such as taxes and utility costs, and (6) reasonable compensation for the receiver in an amount less than the 25 percent markup that was initially permitted. Once the new and corrected judgment amount is calculated, the judgment may be collected on execution according to the proper methods only.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219, neither party having prevailed in full.

PEOPLE v REESE

Docket No. 280001. Submitted September 9, 2008, at Lansing. Decided October 14, 2008, at 9:00 a.m.

Richard Reese, charged in the Wayne Circuit Court with possession with intent to deliver more than 50, but less than 450, grams of cocaine, moved to suppress evidence of the cocaine for which he was charged. Two Inkster police officers had arrested the defendant for loitering after they saw him in a parked taxicab at an apartment complex known as a site for narcotics trafficking and he ignored their instructions for him to leave the area. After learning from the Law Enforcement Information Network that there was an outstanding misdemeanor warrant for the defendant's arrest, the officers had informed the defendant that he was also being arrested pursuant to the warrant. During an inventory search of the taxicab, the police had found the cocaine in a duffel bag between the front seats. The circuit court remanded the case to the 22nd District Court for a determination whether the officers had probable cause to arrest the defendant for loitering. The district court ruled that arrest invalid, and the circuit court, Vonda R. Evans, J., granted the motion to suppress and also dismissed the charge after concluding that the initial arrest had been illegal and that the cocaine evidence had to be suppressed because it was discovered after an illegal arrest. The prosecution appealed.

The Court of Appeals *held*:

1. Evidence discovered in a search incident to an unlawful arrest may be subject to the exclusionary rule as "fruit of the poisonous tree." Not all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal action of the police. Rather, whether the evidence must be suppressed depends on whether the evidence was discovered through the exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

2. Evidence may be sufficiently distinguishable to be purged of the primary taint if the causal connection between the illegal police conduct and the procurement of the evidence is so attenuated as to dissipate the taint of the illegal action.

3. Three factors are considered when determining whether the

causal chain has been sufficiently attenuated to dissipate the taint of the illegal conduct: (1) the elapsed time between the illegality and the acquisition of the evidence, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the misconduct.

4. The discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest. Whether the discovery of a preexisting warrant dissipates or attenuates the illegality of the initial stop or arrest will usually depend on (1) what evidence the police obtained from the initial illegal stop before they discovered the outstanding arrest warrant and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct.

5. In this case, where the initial arrest for loitering was not the result of egregious conduct on the part of the police officers, the discovery of the preexisting warrant dissipated any taint occasioned by the illegal arrest for loitering. The circuit court erred by suppressing the cocaine evidence and dismissing the charge against the defendant.

Reversed and remanded for further proceedings.

SEARCHES AND SEIZURES — ILLEGAL ARREST — EXCLUSIONARY RULE — OUTSTANDING WARRANTS.

The discovery of an outstanding arrest warrant after an illegal arrest can dissipate or attenuate the taint of the initial illegal arrest so as to make admissible any incriminating evidence that is discovered in a proper search incident to the lawful arrest pursuant to the warrant (US Const, Am IV; Const 1963, art 1, § 11).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Lori Baughman Palmer*, Assistant Prosecuting Attorney, for the people.

Wanda R. Cal for the defendant.

Before: O'CONNELL, P.J., and SMOLENSKI and GLEICHER, JJ.

SMOLENSKI, J. The prosecution appeals by right the trial court's suppression of cocaine evidence obtained

after a search of defendant Richard Reese's car and the dismissal of the related charge against him for possession with the intent to deliver more than 50, but less than 450, grams of cocaine. MCL 333.7401(2)(a)(*iii*). On appeal, we must determine whether the discovery of a preexisting warrant, which was discovered only after the disclosure of Reese's identity during an illegal arrest, is a sufficient intervening and untainted event to justify a subsequent search of Reese's car. We conclude that, under the facts of this case, the preexisting warrant was an intervening, untainted justification for the search of Reese's car. For that reason, we reverse the trial court's orders suppressing the cocaine evidence and dismissing the charge against Reese and remand the case for further proceedings. This appeal has been decided without oral argument under MCR 7.214(E).

I. FACTS AND PROCEDURAL HISTORY

In September 2007, two Inkster police officers conducted a routine patrol of an apartment complex known for narcotics trafficking. When the officers arrived at the complex, they observed Reese in a taxicab parked in front of the complex. As the officers approached the cab, Reese shut off the engine and got out of the cab. An officer testified that, even before they asked him any questions, Reese asked, "What are you fucking with me for[?]" The officer stated that they informed Reese that the area was known for drug trafficking and asked him why he was there. Reese responded that he was visiting a friend. The officer testified that he then told Reese, "[E]ither you're going to go visit your friend, or you['re] going to leave the area." But Reese refused to do either. The officer stated that they informed Reese that he might be loitering if he remained. The officer described Reese as agitated, upset, and very nervous. He stated

that, even after warning Reese that he might be loitering, Reese continued to hurl profanities at them and did not leave the area. So the officers arrested Reese for loitering.

After placing Reese under arrest for loitering, the officers asked Reese for identification, which he provided. The officers ran Reese's information through the Law Enforcement Information Network (LEIN) and learned that Reese had an outstanding misdemeanor warrant. An officer informed Reese that he was also under arrest pursuant to the outstanding warrant. After arresting Reese and placing him in the police car, the officers called for a tow truck and performed an inventory search of Reese's car. During the search, the officers found a duffle bag between the driver's seat and the front passenger's seat. The duffle bag contained men's clothing and a brown paper bag with more than 120 grams of cocaine.

At Reese's preliminary examination, the district court expressed its belief that the officers did not have grounds to arrest Reese for loitering. Nevertheless, the district court concluded that the officers had the right to search Reese's car incident to his arrest pursuant to the outstanding warrant. For that reason, the district court bound Reese over to the circuit court on the charge of possession with the intent to deliver cocaine.

Reese's counsel then moved to suppress the cocaine evidence and quash the information. The circuit court also expressed doubt about Reese's arrest for loitering and remanded the case to the district court for a determination whether the police officers had probable cause to arrest Reese for loitering. On remand, the district court determined that Reese's arrest for loitering was invalid.

After the district court's determination, the circuit court heard further arguments concerning Reese's motion to suppress the cocaine evidence. The circuit court concluded that, because Reese's initial arrest was illegal, everything discovered as a result of that arrest had to be suppressed. For that reason, the circuit court granted Reese's motion.

The trial court later dismissed the charges against Reese. The prosecution appealed.

II. SUPPRESSION OF EVIDENCE

A. STANDARD OF REVIEW

On appeal, the prosecution argues that the circuit court erred when it determined that the cocaine evidence had to be suppressed. Specifically, the prosecution argues that the only thing derived from the illegal arrest for loitering was Reese's identity, which is not evidence. Because the police officers properly arrested Reese pursuant to the outstanding misdemeanor warrant, the prosecution further contends, the police could properly search Reese's car incident to that arrest. This Court reviews a trial court's factual findings in a suppression hearing for clear error, *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), but reviews de novo the trial court's ultimate ruling on the motion to suppress, *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

B. THE EXCLUSIONARY RULE

Both the United States Constitution and the Michigan Constitution protect persons against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *Jenkins*, *supra* at 31. In order to lawfully arrest a person without a warrant, a police officer must

"possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). Once police officers lawfully arrest a person, the officers may search that person without further justification. *Id.* The permissible scope of a search incident to lawful arrest includes a search of the passenger compartment of a car recently occupied by the person arrested. *People v Mungo*, 277 Mich App 577, 585-586; 747 NW2d 875 (2008), citing *Thornton v United States*, 541 US 615, 622; 124 S Ct 2127; 158 L Ed 2d 905 (2004); see also *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981).

However, evidence discovered in a search incident to an unlawful arrest may be subject to the exclusionary rule as the "fruit of the poisonous tree." See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). The exclusionary rule is a "judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." *Arizona v Evans*, 514 US 1, 10; 115 S Ct 1185; 131 L Ed 2d 34 (1995). For that reason, its application has been restricted to "those instances where its remedial objectives are thought most efficaciously served." *Id.* at 11. And whether application of the exclusionary rule is appropriate in a particular context is a separate inquiry from whether the police actually violated the Fourth Amendment rights of the person invoking the rule. *Id.* at 10. Further, not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." *Wong Sun*, *supra* at 488. Rather, whether the evidence must be suppressed depends on whether the evidence was discovered through " 'exploitation of that illegality or instead by

means sufficiently distinguishable to be purged of the primary taint.' " *Id.* (citation omitted); see also *People v Lambert*, 174 Mich App 610, 616-617; 436 NW2d 699 (1989).

In this case, the prosecution does not contest the district court's determination that the police officers did not have probable cause to arrest Reese for loitering and, therefore, that that arrest was illegal. Hence, whether the circuit court properly suppressed the cocaine evidence depends on whether that evidence was only " 'come at by exploitation' " of the illegal arrest for loitering " 'or instead by means sufficiently distinguishable to be purged of the primary taint.' " *Wong Sun*, *supra* at 488 (citation omitted).

C. INTERVENING CIRCUMSTANCES

After the officers unlawfully arrested Reese for loitering, they obtained Reese's name and conducted a LEIN check. The LEIN check revealed that Reese had an outstanding misdemeanor warrant. On the basis of this information, the officers also arrested Reese for the misdemeanor.[1] It was only after the officers informed

[1] On appeal, Reese argues that he did not actually have a misdemeanor warrant outstanding at the time of his arrest. However, even if we were to conclude that the LEIN check was inaccurate, that alone would not necessitate the exclusion of evidence discovered after a search incident to an arrest based on that information. See *Arizona v Evans*, 514 US 1, 15-16; 115 S Ct 1185; 131 L Ed 2d 34 (1995) (refusing to apply exclusionary rule to evidence found after a search incident to an arrest based on a quashed warrant where there was no evidence that "the arresting officer was not acting objectively reasonably when he relied upon the police computer record"); *United States v Leon*, 468 US 897; 104 S Ct 3405; 82 L Ed 2d 677 (1984) (refusing to apply the exclusionary rule to evidence found in the execution of a search warrant, which was later determined to be invalid, where the police officers acted in objectively reasonable reliance on the search warrant); see also *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004) (adopting a good faith exception to

Reese of this additional ground for his arrest that they proceeded to search his car and discovered the cocaine. Because the officers could lawfully search Reese's car incident to his arrest pursuant to the outstanding warrant, *Mungo*, *supra* at 585-586, we must determine whether the discovery of this preexisting warrant constitutes an independent basis, which dissipates the taint from the initial illegal arrest, for conducting the search of Reese's car.

On appeal, Reese notes that the police officers would not have been able to perform a LEIN check had they not learned his name, which they learned only after his illegal arrest. Because the discovery of his name was tainted by the illegal arrest, the discovery of the warrant was similarly tainted. For this reason, Reese contends, this Court must conclude that there was no basis for the search of his car. Although there are apparently no Michigan authorities directly on point, several foreign jurisdictions have confronted factual situations similar to this one.

A leading case on this issue is *United States v Green*, 111 F3d 515 (CA 7, 1997). In *Green*, two police officers on routine patrol observed a car ahead of them that one of the officers recognized as having been parked in front of the residence of a person wanted on a federal warrant. *Id.* at 517. The officers decided to follow the

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the exclusionary rule). Instead, if the police officers relied in good faith on the information provided by the LEIN check, the evidence would not be subject to the exclusionary rule. *Evans*, *supra* at 15-16. Because there is no evidence that the arresting officers were not acting objectively reasonably when they relied on the information provided by the LEIN check, even if the arrest based on the warrant disclosed by the LEIN system were unlawful, the cocaine evidence discovered as a search incident to that arrest would not be subject to the exclusionary rule. For that reason, the primary issue on appeal remains whether the discovery of the cocaine was the result of the exploitation of Reese's illegal arrest for loitering.

car on the chance that the wanted person might be in it or that the occupants might know that person's whereabouts. After turning a corner, the driver of the car made a U-turn, turned abruptly onto another street, and stopped on a driveway. The officers followed the car and blocked the driveway with their car. *Id*.

The driver of the car, David Green, got out and began walking to the house, but stopped after one of the officers hailed him. *Id*. While one of the officers obtained David's identification, the other obtained identification from David's passenger, who turned out to be David's brother, Avery. After checking the brothers' identities in their computer system, the officers discovered that Avery had an outstanding warrant. *Id*. The officers then searched the car and discovered crack cocaine and a gun. *Id*. David was later convicted by a jury of charges related to his possession of the cocaine and the gun. *Id*. at 518.

On appeal, David argued that the trial court erred when it refused to suppress evidence of the gun and the crack cocaine seized after the illegal stop. *Id*. The court agreed with Green's contentions that the stop was illegal and that " 'but for' the illegal traffic stop, the police would never have discovered the cocaine and gun." *Id*. at 520. But, citing *Wong Sun*, *supra* at 487-488, the court noted that the Supreme Court had rejected a simple causation analysis: "Thus, '[e]ven in situations where the exclusionary rule is plainly applicable, [the Supreme Court has] declined to adopt a "per se" or "but for" rule that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest.' " *Id*., quoting *United States v Cecolini*, 435 US 268, 276; 98 S Ct 1054; 55 L Ed 2d 268 (1978). Rather, the court

stated, the proper question is whether the evidence came to light through exploitation of the illegal conduct or by means sufficiently distinguishable to be purged of the taint from the illegal conduct. *Id.* at 520-521, citing *Wong Sun*, *supra* at 488. The court further noted that "[e]vidence may be 'sufficiently distinguishable to be purged of the primary taint' if 'the causal connection between [the] illegal police conduct and the procurement of [the] evidence is "so attenuated as to dissipate the taint" of the illegal action.' " *Green*, *supra* at 521, quoting *United States v Liss*, 103 F3d 617, 620 (CA 7, 1997), quoting *United States v Fazio*, 914 F2d 950, 957 (CA 7, 1990). The court then noted that there were three factors for determining "whether the causal chain has been sufficiently attenuated to dissipate the taint of illegal conduct: (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of the intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." *Green*, *supra* at 521, citing *Brown v Illinois*, 422 US 590, 603-604; 95 S Ct 2254; 45 L Ed 2d 416 (1975).

In analyzing these factors, the court noted that the first factor weighed in favor of suppression, but that it was not dispositive on the question of taint. Instead, the court focused on the second and third factors. *Green*, *supra* at 521. With regard to the second factor, the court concluded that the discovery of the arrest warrant for Avery was an intervening circumstance that was not outweighed by flagrant official misconduct and, consequently, dissipated any taint caused by the illegal stop.

> It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant—in a sense requiring an official call of "Olly, Olly, Oxen Free." Because the arrest is lawful, a search incident to the arrest is also lawful. The lawful arrest of Avery constituted an

> intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop. [*Id.*]

Finally, the court turned to the third factor, which it noted was " 'tied to the rationale of the exclusionary rule itself' " and aimed at exploring whether the police exploited their illegal conduct. *Id.* at 523, quoting *Fazio*, *supra* at 958. The court concluded that under the facts of the case, the police misconduct was not flagrant. The court explained that, although the stop was illegal, there was no evidence of bad faith on the part of the officers and the purpose of the stop was not to obtain evidence against the Greens. *Green*, *supra* at 523.

> Nor did the police exploit the stop in order to search the automobile. Rather the search only came after they learned that Avery was wanted on a warrant and arrested him. While the officers learned of the outstanding warrant only after continuing the illegal detention, the arrest of Avery was not an exploitation of the illegal stop. [*Id.*]

For these reasons, the court concluded that Green was not entitled to have the cocaine and gun evidence suppressed. *Id*.

Courts in several jurisdictions have come to the same legal conclusion on facts analogous to those of *Green*.[2]

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[2] See, e.g., *State v Allen*, 222 Or App 71, 79; 191 P3d 762 (2008) (noting that the discovery of outstanding arrest warrants and their execution are intervening events that interrupt the causal connection between the seized evidence and the prior illegal stop); *Myers v State*, 395 Md 261; 909 A2d 1048 (2006); *State v Frierson*, 926 So 2d 1139, 1144-1145 (Fla, 2006) (relying on *Green* and refusing to suppress the evidence because, although the officer made a mistake in the enforcement of the traffic laws, there was no evidence that the stop was a pretext or made in bad faith); *United States v Simpson*, 439 F3d 490 (CA 8, 2006) (citing *Green* with approval and concluding that, where the officers did not knowingly act unconstitutionally and did not purposefully act in an effort to gain evidence, the discovery of a preexisting warrant will constitute an independent basis for questioning and searching the defendant); *Jacobs v State*, 128 P3d 1085 (Okla Crim App, 2006); *State v Page*, 140 Idaho 841,

Of those courts, the Alaska Supreme Court's analysis in *McBath v State*, 108 P3d 241 (Alas, 2005), is particularly informative.

The defendant in *McBath* was the passenger in a truck that was stopped for having an expired license plate. *McBath*, *supra* at 242. After stopping the truck, the police discovered that the driver was intoxicated and they arrested him. The police told McBath that he was free to go. *Id.* However, McBath then called out to the driver and asked him if there was anything that McBath should remove from the truck before it was towed. The driver asked McBath to remove a toolbox and an unopened 12-pack of beer. *Id.* The police were willing to permit McBath to remove the items, but insisted that he give his name first. When McBath first refused and later provided an unlikely name, the police

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846; 103 P3d 454 (2004); *Hardy v Commonwealth*, 149 SW3d 433, 436 (Ky App, 2004); *Quinn v State*, 792 NE2d 597 (Ind App, 2003); *Fletcher v State*, 90 SW3d 419 (Tex App, 2002); *State v Jones*, 270 Kan 526, 529; 17 P3d 359 (2001) (relying on *Green* and concluding that, because there was no evidence of bad faith on the part of the officer, once he discovered the outstanding warrant, the officer had the right and duty to arrest the defendant and effect a subsequent search); *People v Murray*, 312 Ill App 3d 685, 691-692; 728 NE2d 512 (2000) (characterizing the notion that the police cannot arrest a person on a valid warrant after an illegal stop as "illogical and nonsensical"); *State v Hill*, 725 So 2d 1282, 1287 (La, 1998); *Ruffin v State*, 201 Ga App 792; 412 SE2d 850 (1991); *State v Thompson*, 231 Neb 771; 438 NW2d 131 (1989); *State v Lamaster*, 652 SW2d 885 (Mo App, 1983); *People v Hillyard*, 197 Colo 83; 589 P2d 939 (1979); *State v Rothenberger*, 73 Wash 2d 596, 598; 440 P2d 184 (1968) (stating that the suggestion that officers may not make an arrest on a valid warrant after an illegal stop as "indescribably silly"); see also *United States v Hudson*, 405 F3d 425, 438 (CA 6, 2005) (approvingly citing *Green*, but concluding that a stop to see if the person stopped is the person named in a warrant is illegal and that the evidence discovered incident to a subsequent arrest must be suppressed); *State v Soto*, 143 NM 631; 179 P3d 1239 (2008) (concluding that a search subsequent to discovery of a preexisting search warrant was tainted where the purpose of the stop was to run a warrant check). But see *Sanchez v State*, 803 NE2d 215, 222 (Ind App, 2004) (declining to follow *Quinn*).

decided to detain him. *Id.* at 242-243. McBath then revealed his real name and, after a computer search, the officers discovered that McBath had an outstanding warrant. The officers then arrested McBath on the warrant and searched his person only to discover methamphetamine. *Id.* at 243.

On appeal, McBath argued that the methamphetamine should have been suppressed as the fruit of the illegal stop. *Id.* The court in *McBath* examined *Green*, as well as several foreign authorities, and concluded that the proper test for determining whether the methamphetamine should be suppressed must be determined by examining the *Brown* factors. *Id.* at 248, citing *Brown*, *supra* at 603. However, the court noted that the first *Brown* factor will invariably favor suppression because, in cases involving the discovery of a preexisting warrant, there will almost always be very little time between the illegal stop and the discovery of the warrant. Yet the court stated that "the courts that have considered this question have all but unanimously concluded that, in this kind of situation, the first *Brown* factor is outweighed by the others." *McBath*, *supra* at 248.

> The following rule emerges from these cases: If, during a non-flagrant but illegal stop, the police learn the defendant's name, and the disclosure of that name leads to the discovery of an outstanding warrant for the defendant's arrest, and the execution of that warrant leads to the discovery of evidence, the existence of the arrest warrant will be deemed an independent intervening circumstance that dissipates the taint of the initial illegal stop vis-à-vis the evidence discovered as a consequence of a search incident to the execution of the arrest warrant. [*Id.*]

Because it was persuaded that this rule was consistent with the policy behind the exclusionary rule, that is, to deter police misconduct, the court in *McBath* adopted the rule that "a pre-existing arrest warrant can (de-

pending on the circumstances) dissipate or attenuate the taint of a prior illegal stop." *Id.* at 249. Because the police conduct was not flagrant or egregious under the circumstances and the search occurred only after the discovery of the arrest warrant, the court concluded that any taint from the illegal stop was too attenuated to affect the admissibility of the methamphetamine. *Id.* at 249-250.

We agree with the reasoning in *McBath* and *Green* and join those jurisdictions that hold that discovery of an outstanding arrest warrant can dissipate or attenuate the taint of an initial illegal stop or arrest. As the court in *Jacobs v State*, 128 P3d 1085, 1089 (Okla Crim App, 2006), aptly noted:

> Our decision balances a defendant's right against illegal search and seizure with the community's expectation that a valid arrest warrant may be served upon a subject, even if police learned about the arrest warrant after an illegal stop. This rule discourages police from flagrantly illegal, investigatory seizures. At the same time, it does not attempt to punish police for mistakes or errors made in good faith. Such punishment would be unlikely to deter police misconduct.[3]

D. APPLICATION OF THE LAW TO THE FACTS

Although courts confronted with this issue should examine each of the factors from *Brown*, whether the discovery of a preexisting warrant dissipates or attenu-

[3] We are also mindful of the serious implications that would follow from a contrary holding: "For example, if the police illegally detain a suspect and discover arrest warrants, may they release the suspect and re-arrest him and then conduct a legal search? If not, is he forever immune from the consequences of a search incident to a subsequent arrest under those same warrants? If so, when can they re-arrest him? After he steps outside the door of the police station? A block away? The same day?" *Fletcher*, *supra* at 421.

ates the illegality of the initial stop or arrest will usually depend on two main points: "(1) what evidence did the police obtain from the initial illegal stop *before* they discovered the outstanding arrest warrant, and (2) whether that initial illegal stop was a manifestation of flagrant police misconduct—i.e., conduct that was obviously illegal, or that was particularly egregious, or that was done for the purpose of abridging the defendant's rights." *McBath*, *supra* at 248 (emphasis in original). Purposeful and flagrant misconduct exists where "(1) the impropriety of the official's misconduct was obvious or the official knew, at the time, that his conduct was likely unconstitutional" but engaged in it anyway, or where "(2) the misconduct was investigatory in design and purpose and executed 'in the hope that something might turn up.' " *United States v Simpson*, 439 F3d 490, 496 (CA 8, 2006), quoting *Brown*, *supra* at 605. But where the police only discover the defendant's identity as a result of the initial illegal stop or arrest, and the police misconduct was not particularly egregious or the result of bad faith, the discovery of a preexisting arrest warrant will constitute an intervening circumstance that dissipates the taint of the initial illegal stop or arrest. As such, evidence that is discovered in a subsequent search incident to the lawful arrest need not be suppressed.

In the present case, there is no evidence that the officers' decision to initially speak to Reese was motivated by an improper purpose or that they improperly detained him. Indeed, the officers not only made it clear to Reese that he was free to go, they actually asked him to leave at least twice. There is also no evidence that the officers' ultimate decision to arrest Reese for loitering was motivated by an investigatory purpose—a desire to discover Reese's identity for a LEIN check or as a pretext to search his car. And, although the decision to arrest Reese for loitering may have been influenced by

Reese's belligerent refusal to move along, there is also evidence that the officers genuinely believed that Reese committed the offense of loitering. See *Simpson*, *supra* at 496. Hence, the misconduct at issue was not flagrant or particularly egregious and may have been the result of a mistaken belief about the nature of the loitering offense. Furthermore, even though the officers placed Reese under arrest for loitering, they did not immediately search his car.[4] Instead, they obtained his name and conducted a LEIN check, which revealed an outstanding misdemeanor warrant. It was only after the officers placed Reese under arrest pursuant to the outstanding warrant that they searched his car and discovered the cocaine.

Because the officers' initial misconduct—the arrest for loitering—was not particularly egregious or motivated by bad faith and only yielded Reese's identity, the subsequent discovery of the preexisting arrest warrant was not tainted by the illegality of that initial arrest. As such, the discovery of the preexisting warrant constituted an intervening circumstance that broke the causal connection between the illegal arrest and the discovery of the cocaine evidence. Because the search was independently justified as a search incident to the lawful arrest on the warrant, Reese was not entitled to have the cocaine evidence suppressed.

III. CONCLUSION

In the absence of egregious conduct on the part of the arresting officers, the discovery of the preexisting war-

[4] Had the officers searched Reese's car under authority of the illegal arrest and only later discovered the preexisting warrant, the discovery of the preexisting arrest warrant could not have served to dissipate or attenuate the illegality of the arrest and, accordingly, the cocaine evidence would clearly have been the "fruit" of the illegal arrest. See *McBath*, *supra* at 249.

rant dissipated any taint occasioned by Reese's illegal arrest for loitering. Accordingly, the circuit court erred when it concluded that the cocaine was the fruit of Reese's illegal arrest and suppressed the cocaine evidence and dismissed the possession of cocaine with the intent to deliver charge on the basis of that conclusion. Therefore, we reverse the circuit court's decisions to suppress the cocaine evidence and dismiss the charge against Reese, and we remand the case for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

CHAMPION v SECRETARY OF STATE

Docket No. 277337. Submitted September 3, 2008, at Lansing. Decided October 16, 2008, at 9:00 a.m. Leave to appeal sought.

Cary M. Champion brought an action in the Court of Claims against the Secretary of State, alleging that the defendant's refusal to renew his driver's license unless he provides his social security number to the defendant, and the defendant's rejection of the religious ground the plaintiff asserted in refusing to provide his number, violated Const 1963, art 1, § 4 (freedom of worship and religious belief) and Const 1963, art 1, § 2 (equal protection). The plaintiff, relying on the Tenth Amendment and US Const, art I, § 8 (the Spending Clause), also sought a declaratory ruling that the state of Michigan had engaged in unconstitutional activity by entering into a contract with the federal government pursuant to which the state receives federal funds for child-support enforcement in exchange for the state's compliance with federal law requiring the procurement of social security numbers from driver's license applicants. The court, Beverley Nettles-Nickerson, J., granted summary disposition for the defendant. The plaintiff appealed.

The Court of Appeals *held*:

1. MCL 257.307(1)(a), which requires driver's license applicants to provide their social security numbers to the defendant, is not violative of Const 1963, art 1, § 4. The "compelling state interest" test is used for determining whether a statute, as applied to a person, violates art 1, § 4. Examined under that test are: (1) whether the person's belief, or conduct motivated by belief, is sincerely held, (2) whether the person's belief, or conduct motivated by belief, is religious in nature, (3) whether the statute imposes a burden on the exercise of that belief or conduct, (4) whether a compelling state interest justifies the burden imposed on the person's belief or conduct, and (5) whether there is a less obtrusive form of regulation available to the state. In this case, the plaintiff's beliefs regarding social security numbers, and his conduct motivated by those beliefs, are genuine and sincere. It is also not disputed that the plaintiff's beliefs and the actions taken by him in furtherance of those beliefs are religious in nature, arising from his interpretation of the mark of beast in the Book of Revelation of the New Testament. Whether the

plaintiff's exercise of his religious beliefs was truly burdened by MCL 257.307(1)(a) need not be addressed in light of the analysis of the remaining two factors. The Child Support and Establishment of Paternity Act (CSEPA), 42 USC 651 *et seq*., and its requirement under 42 USC 666(a)(13)(A) that driver's license applicants furnish their social security numbers, as incorporated by MCL 257.307(1)(a), serve compelling state interests in the establishment of paternity, the tracking and locating of parents legally obligated to pay child support, the enforcement of support obligations, and the collection of support payments. Finally, there are no less restrictive or obtrusive means available to promote the compelling state interests. The reporting of social security numbers on driver's license applications is essential to accomplishing the state interests.

2. The plaintiff's claim of a violation of his right to equal protection under Const 1963, art 1, § 2 lacks merit. The plaintiff is not similarly situated as persons who do not have to report a social security number because they do not have one. Equal protection does not require that the same treatment be given those who are not similarly situated.

3. The state's participation under the CSEPA does not constitute an unconstitutional state-federal contract under the Spending Clause or the Tenth Amendment. Congress's enactment of the CSEPA under the Spending Clause, and specifically in relation to the requirement that driver's license applicants furnish social security numbers, did not induce the state to engage in unconstitutional activities relative to the free exercise of religion, given that MCL 257.307(1)(a) does not violate Const 1963, art 1, § 4. The offer of benefits to a state by the federal government upon cooperation by the state with federal plans, presumably for the general welfare, does not violate the Tenth Amendment limitation on congressional regulation of state affairs.

Affirmed.

Cary M. Champion*, in propria persona*.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Kevin L. Francart*, Assistant Attorney General, for the defendant.

Before: DONOFRIO, P.J., and MURPHY and FITZGERALD, JJ.

MURPHY, J. Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant in this action arising out of plaintiff's repeated unsuccessful attempts to renew his driver's license without reporting his social security number on the renewal application. Plaintiff, citing his right to freely exercise his religious beliefs,[1] refused to furnish his social security number as demanded by defendant pursuant to the requirements of MCL 257.307(1)(a). On appeal, plaintiff raises numerous constitutional and statutory issues. We affirm.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Issues of statutory construction and questions of constitutional law are likewise reviewed de novo on appeal. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

In his complaint, plaintiff alleged that defendant, by refusing to allow him to renew his license without submitting his social security number and by rejecting the religious grounds given for his stance, knowingly and willfully violated Const 1963, art 1, § 4 (freedom of worship and religious belief), violated Const 1963, art 1, § 2 (equal protection),[2] and violated MCL 257.307(13). In his

[1] In plaintiff's appellate brief, he reveals his "religious belief that social security numbers are at best an immediate precursor to the mark of the beast, described in the Book of Revelation at Chapter 14, verses 16-17, and Chapter 20, verse 4."

[2] We note that these two constitutional challenges to the social security number requirement found in MCL 257.307(1)(a) are not facial challenges, but rather challenges to the enforcement of the provision against plaintiff or, worded differently, "as applied" challenges. "When faced with a claim that application of a statute renders it unconstitutional, the Court must analyze the statute 'as applied' to the particular case." *Crego v Coleman*, 463 Mich 248, 269; 615 NW2d 218 (2000).

prayer for relief, plaintiff requested renewal of his license without fee, cost, or payment, retroactive renewal to the expiration date of his last license, the drafting of a standard form by defendant, in accordance with MCL 257.307(13), for use by individuals who, for religious reasons, do not want to divulge their social security numbers in the license application and renewal process, and money damages in the amount of $10 million. Plaintiff also sought a declaratory ruling that the state engaged in unconstitutional activity by entering into a contract with the federal government pursuant to which the state receives federal child support enforcement funds in exchange for compliance with federal law dictating the procurement of social security numbers on license applications in violation of religious freedoms. This last assertion was founded on principles arising from the Tenth Amendment and the Spending Clause, art I, § 8, of the United States Constitution.[3]

MCL 257.307(1)(a) mandates that an application for an operator's or chauffeur's license contain the following:

> The applicant's full legal name, date of birth, residence address, height, sex, eye color, signature, . . . intent to make an anatomical gift, other information required or permitted on the license under this chapter, *and, only to the extent required to comply with federal law, the applicant's social security number*. . . . [Emphasis added.]

To qualify for various federal welfare funds, states must certify that they will operate a child support

[3] The Court of Claims adjudicated this original action, granting summary disposition in favor of defendant in cursory fashion. Defendant did not argue below, and does not argue on appeal, that plaintiff's sole avenue of relief was a driver's license appeal to the circuit court in plaintiff's county of residence pursuant to MCL 257.323. Therefore, we shall not explore that potential issue.

enforcement program that conforms to Title IV-D of the Social Security Act, as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, PL 104-193, which we shall refer to as the Child Support and Establishment of Paternity Act (CSEPA), 42 USC 651 *et seq.*, and that they will do so pursuant to an approved detailed plan. *Blessing v Freestone*, 520 US 329, 333; 117 S Ct 1353; 137 L Ed 2d 569 (1997). The states must collect overdue support payments, establish comprehensive systems to establish paternity, locate absent parents, and help families obtain support orders. *Id.* at 333-334. Pursuant to 42 USC 654(20), "[a] State plan for child and spousal support must . . . provide, to the extent required by [42 USC 666], that the State . . . shall have in effect all of the laws to improve child support enforcement effectiveness which are referred to in that section[.]" 42 USC 666(a) provides in relevant part:

> In order to satisfy [42 USC 654(20)(A)], each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:
>
> * * *
>
> (13) Recording of social security numbers in certain family matters.—Procedures requiring that the social security number of—
>
> (A) any applicant for a professional license, *driver's license*, occupational license, recreational license, or marriage license be recorded on the application[.]
>
> * * *
>
> For purposes of subparagraph (A), if a State allows the use of a number other than the social security number to be

> used on the face of the document while the social security number is kept on file at the agency, the State shall so advise any applicants. [Emphasis added.]

Because there is no dispute that Michigan operates a child support enforcement program that meets the requirements of the CSEPA and Michigan receives federal funding because of its participation, 42 USC 654(20) mandates that Michigan comply with 42 USC 666(a)(13)(A).[4] We also note that the final paragraph of 42 USC 666(a)(13) that refers to the use of a number other than a social security number does not create an exception to the recording requirement in § 666(a)(13)(A). See *Lewis v Idaho Dep't of Transportation*, 143 Idaho 418, 423 n 4; 146 P3d 684 (Idaho App, 2006) (applicant's social security number need not be recorded on the license itself, but it still must be reported or furnished by the applicant for purposes of having the information in the department file).

We first address plaintiff's arguments under former MCL 257.307(13). At the time of the license renewal efforts and the filing of the complaint, MCL 257.307(13) provided:

> A requirement under this section to include a social security number on [a driver's license] application does not apply to an applicant who demonstrates he or she is exempt under law from obtaining a social security number *or to an applicant who for religious convictions is exempt under law from disclosure of his or her social security number under*

[4] As indicated in *Tenison v State*, 38 P3d 535, 537 (Alas App, 2001), "[t]he federal government has no authority to directly order the states to change their licensing laws, so Congress used an economic incentive: states lose a substantial portion of their federal funding for various welfare programs if they do not require all license applicants to supply their social security number." The CSEPA was enacted pursuant to congressional power under the Spending Clause. See generally *Hodges v Thompson*, 311 F3d 316 (CA 4, 2002).

> *these circumstances*. The secretary of state shall inform the applicant of this possible exemption. [2004 PA 362 (emphasis added).]

Pursuant to 2008 PA 7, subsection 13 was amended, deleting the religious-conviction exemption, and it now simply provides that "[a] requirement under this section to include a social security number on an application does not apply to an applicant who demonstrates he or she is exempt under law from obtaining a social security number."

Former MCL 257.307(13) required that the applicant be "exempt under law," which necessarily directs attention to a law other than § 307(13). In *Cheeseman v American Multi-Cinema, Inc*, 108 Mich App 428, 433; 310 NW2d 408 (1981), this Court rejected an argument that the words "except where permitted by law" reflected a legislative intent to encompass solely statutory law. The *Cheeseman* panel ruled that "the term 'law' includes the entire body of law including but not limited to the constitution, the statutes, administrative rules and regulations, and the common law as embodied in decisions and judgments of courts[.]" *Id.* at 441. Thus, the use of the term "law" here includes constitutional provisions that would carve out a religion-based exception to the social security number requirement.

Aside from Tenth Amendment and Spending Clause arguments on the final appellate issue addressed later, plaintiff's complaint and arguments on appeal rely solely on Const 1963, art 1, §§ 2 and 4. Plaintiff does not place any reliance on the Free Exercise Clause or the Establishment Clause of the First Amendment of the United States Constitution, nor on the Equal Protection Clause of the Fourteenth Amendment.

Article 1, § 4, of the Michigan Constitution, which addresses freedom of religion, provides in relevant part:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. . . . The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

Plaintiff's claims fit under the first and last sentences of Const 1963, art 1, § 4, because he argues that his liberty to worship according to his own conscience would be compromised if effectively forced by defendant to engage in an activity inconsistent with his religious beliefs and that his driving privileges were diminished on account of his beliefs.

Pursuant to *McCready v Hoffius*, 459 Mich 131, 143; 586 NW2d 723 (1998), vacated in part 459 Mich 1235 (1999), and *Reid v Kenowa Hills Pub Schools*, 261 Mich App 17, 27; 680 NW2d 62 (2004), we apply the compelling state interest test (strict scrutiny) to challenges under the free exercise language in Const 1963, art 1, § 4, regardless of whether the statute at issue is generally applicable and religion-neutral, which is the case here.[5] In *McCready, supra* at 143-144, the Court stated:

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[5] In *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 885-886; 110 S Ct 1595; 108 L Ed 2d 876 (1990), the United States Supreme Court, analyzing a case under the Free Exercise Clause of the First Amendment, held that generally applicable, religion-neutral laws that, in effect, burden a religious practice need not be justified by a compelling state interest. See also the plurality opinion in *Bowen v Roy*, 476 US 693, 702-712; 106 S Ct 2147; 90 L Ed 2d 735 (1986). *McCready* applied *Smith* to a challenge made pursuant to the Free Exercise Clause of the First Amendment, but then applied the compelling state interest test to its analysis under Const 1963, art 1, § 4. *McCready, supra* at 142-144. We note that there exists caselaw indicating that the free exercise language in Const 1963, art 1, § 4, and the Free Exercise Clause of the First Amendment are subject to similar interpretation. *Advisory*

> Next, we turn to defendants' claim that the act violates their religious freedom under art 1, § 4 of the Michigan Constitution of 1963. We analyze the [issue] . . . under the compelling state interest test . . . .
>
> The test has five elements: (1) whether a defendant's belief, or conduct motivated by belief, is sincerely held; (2) whether a defendant's belief, or conduct motivated by belief, is religious in nature; (3) whether a state regulation imposes a burden on the exercise of such belief or conduct; (4) whether a compelling state interest justifies the burden imposed upon a defendant's belief or conduct; and (5) whether there is a less obtrusive form of regulation available to the state. [Citations omitted.]

With respect to the compelling state interest test, defendant concedes that plaintiff's beliefs regarding social security numbers, and his conduct motivated by those beliefs, are genuine and sincere. And it is not

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Opinion re Constitutionality of 1970 PA 100, 384 Mich 82, 105; 180 NW2d 265 (1970); *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 156; 756 NW2d 483 (2008); *Scalise v Boy Scouts of America*, 265 Mich App 1, 11; 692 NW2d 858 (2005). However, *McCready*, being the latest pronouncement by our Supreme Court on the issue, controls our analysis and requires application of strict scrutiny under the compelling state interest test. *Washington Mut Bank, FA v ShoreBank Corp*, 267 Mich App 111, 119; 703 NW2d 486 (2005) ("We are obligated to follow the most recent pronouncement of the Supreme Court on a principle of law."). The Michigan Supreme Court in *Donkers v Kovach*, 481 Mich 897 (2008), recently voted to deny an application for leave to appeal in a case involving witness oaths, and three members of the Court who dissented from the order voiced their concerns that post-*Smith* cases, specifically *McCready* and *Reid*, applied strict scrutiny under the compelling state interest test to religious freedom challenges under Const 1963, art 1, § 4, relative to religion-neutral laws that were generally applicable, yet failed to explain the basis for imposing a greater burden. We do note that under Michigan and federal constitutional analysis, strict scrutiny is applicable in hybrid cases, i.e., cases in which a free exercise claim is made in conjunction with other constitutional protections such as freedom of speech, freedom of the press, or the right of parents to direct the education of their children, even where the challenged law is generally applicable and religion-neutral. *Smith, supra* at 881; *People v DeJonge (After Remand)*, 442 Mich 266, 279; 501 NW2d 127 (1993).

disputed that plaintiff's genuine beliefs and the actions taken by him in furtherance of those beliefs are religious in nature, arising from his interpretation of the Book of Revelation contained in the New Testament. Therefore, the first two elements of the test are satisfied. On the issue concerning whether the social security number requirement of MCL 257.307(1)(a) burdens the exercise of plaintiff's religious beliefs, plaintiff contends that the statute forces him to choose between abandoning his religious convictions so that he can operate a vehicle, a privilege enjoyed by others, and staying faithful to his beliefs while forgoing a driver's license. Given the fact that we dispose of plaintiff's claim under the remaining elements of the compelling state interest test, we decline to make a specific finding regarding whether the exercise of plaintiff's religious beliefs was truly burdened by the application of MCL 257.307(1)(a).

Next, we must ascertain whether a compelling state interest justifies the presumed burden imposed on plaintiff's religious beliefs and related conduct. Because ultimately federal law, the CSEPA, is incorporated by reference into MCL 257.307(1)(a) and a governmental interest, whether state or federal, is at stake, we deem it appropriate to examine the purpose behind the federal law in determining whether a compelling state interest exists. 42 USC 651 provides:

> For the purpose of enforcing the support obligations owed by noncustodial parents to their children and the spouse (or former spouse) with whom such children are living, locating noncustodial parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for assistance under a state program funded under part A of this subchapter) for whom such assistance is requested,

> there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

Consistent with caselaw issued by courts across this country, including Michigan, there is a strong and compelling state interest in preserving and promoting the welfare of children relative to their financial health, which affects their overall well-being, by means of child support legislation, including enactments providing for court filiation and support orders, support enforcement and collection mechanisms, and other provisions securing the support of children. *Prince v Massachusetts*, 321 US 158, 168; 64 S Ct 438; 88 L Ed 645 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection."); *Crego v Coleman*, 463 Mich 248, 273; 615 NW2d 218 (2000) ("Providing financial support for children is a permissible, important, and even compelling governmental interest."); *Torres v Kunze*, 106 Conn App 802, 810; 945 A2d 472 (2008) (one cannot imagine a more compelling state interest than the support of children); *In re Marriage of Paredes*, 371 Ill App 3d 647, 653; 863 NE2d 788 (2007) (" '[I]t is difficult to imagine a more compelling State interest than the support of children.' " [Citation omitted.]); *In re Marriage of Didier*, 134 Wash App 490, 499; 140 P3d 607 (2006) (neutral and generally applicable support laws "embody the state's compelling interest of seeing that parents provide for their children"); *Hur v Virginia Dep't of Social Services Div of Child Support Enforcement*, 13 Va App 54, 58; 409 SE2d 454 (1991) ("[D]uty of support to . . . children is necessarily related to the compelling governmental interest of preserving the

welfare of children").[6]

Stated in more narrowly defined terms, the government has a compelling interest in the establishment of paternity, the tracking and locating of parents legally obligated to pay child support, the enforcement of support obligations, and the collection of support pay-

[6] We reject defendant's argument that Michigan also has a compelling state interest in obtaining federal funding made available only if the state complies with the CSEPA. See 42 USC 655 (funds for operating costs), 42 USC 658a (incentive payments), 42 USC 669b (monies for access and visitation programs), and 42 USC 601 *et seq*. (grant monies for needy family programs). While Michigan certainly has an interest in obtaining federal funds, which may even be a fiscal necessity, we are not prepared to rule that the interest is compelling in the context of the analysis concerning constitutional rights. It would indeed be troubling to conclude that Michigan can, without state constitutional ramifications, effectively burden a citizen's free exercise of religion, or any constitutional right, if sufficient monies are thrown in its direction by the federal government. We are in agreement with the assessment made by the United States Court of Appeals for the Tenth Circuit in *United States v Hardman*, 297 F3d 1116, 1127 (CA 10, 2002), that "a desire for federal funds is not a compelling interest." See also *Church on the Rock v City of Albuquerque*, 84 F3d 1273, 1280 (CA 10, 1996) (fact that city policy prohibiting use of public senior centers as places for religious worship was designed to comply with federal laws conditioning federal funding on compliance does not shelter policy from constitutional scrutiny as a city or state's wish for federal funds does not constitute a compelling state interest).

We also reject defendant's reliance on the REAL ID Act of 2005 (RIA), PL 109-13, 119 Stat 302, for purposes of identifying a compelling state interest. "The [RIA] requires that federal agencies accept only state-issued driver's licenses and identification cards that meet stringent information requirements." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 10 n 11; 740 NW2d 444 (2007). The relevant language in MCL 257.307(1)(a) regarding social security numbers was not enacted in furtherance of the RIA. Even though the RIA had already been enacted by Congress when plaintiff was seeking renewal of his driver's license, Michigan has not yet implemented the act through legislation, having been granted an extension for compliance, so it cannot be said that defendant required plaintiff to report his social security number in order to serve the purposes and goals of the RIA. Therefore, we decline to consider the RIA in our analysis.

ments, and doing so in timely fashion, along with otherwise having in place a data-collection mechanism and network to assist in locating individuals, establishing paternity, and enforcing support obligations with respect to future births and parental responsibilities. The CSEPA's requirement that driver's license applicants furnish their social security numbers, as incorporated by MCL 257.307(1)(a), greatly assists in promoting these interests, and thus helps to successfully accomplish the broad compelling interest or goal of providing for the welfare of children because a social security number can be used as an important and practical tool to collect necessary information and data for support and paternity purposes. A social security number is a unique federal identifier that can be effectively used to locate absent parents and withhold wages, all in the name of supporting children. See *Michigan Dep't of State v United States*, 166 F Supp 2d 1228, 1231-1233 (WD Mich, 2001) (Congress, demonstrating a strong public policy for using a federal identifier, intended to create and have in place a rapid response and automated mechanism to locate absent parents, withhold wages, and otherwise collect support through use of and reference to social security numbers drawn from license applications and entered into databases); *McDonald v Alabama Dep't of Pub Safety*, 756 So 2d 880, 881-882 (Ala Civ App, 1999) (importance of social security numbers as unique identifiers is not in doubt).

Finally, we must determine whether there is a less obtrusive or restrictive means available to the state by which to promote its compelling interests such that plaintiff's religious objections can be accommodated.

We conclude that there are no less restrictive or obtrusive means available to promote the compelling

state interests at stake here and that the reporting of social security numbers on license applications is essential to accomplishing these interests. Granting exemptions for plaintiff and other religious objectors would defeat the goals and interests sought to be promoted by the legislation.

Plaintiff argues that the interests could be promoted by simply waiting until he has a child and is involved in divorce or paternity proceedings before collecting the information, instead of demanding that he and all license applicants furnish their social security numbers despite religious objections.[7] The first problem with this argument is that plaintiff himself suggested that he would not be compliant with the requirement to report his social security number even in divorce or paternity proceedings. Second, there is absolutely no guarantee that any person who has conceived a child would actually become involved in family court proceedings such that a social security number could be reported, either because of a purposeful attempt to evade court process or because the parent, without intent to evade process, cannot be located, possibly having no knowledge of the child. Indeed, the social security number, if previously procured from a license application, could be used to locate a parent under those circumstances and subject them to court process. Finally, we have contem-

[7] Plaintiff asserted at oral argument that he does not have any children. We also note that plaintiff claimed to have never reported his social security number to defendant because, before the renewal application at issue here, such requirement was not in place when he last renewed his license. Consistently with this statement, counsel for defendant noted at argument that had plaintiff previously reported his social security number to defendant, the number would have been preprinted on the renewal application, which was not the case. 1998 PA 330 added the statutory language at issue relative to furnishing social security numbers.

plated the feasibility of allowing a religious exemption for someone who has no children because the compelling interest to support children would not appear to be at risk if a license applicant has no offspring; however, that appearance would be deceiving. Defendant would have the onerous task of confirming whether a religious objector has children, let alone dealing with the issue whether a religious belief is genuine, and some license applicants could intentionally be deceptive on the issue, or male applicants might simply not be aware of their parental status. But more importantly, much can transpire during the period between license renewals such that a license applicant can become a parent after renewing his or her license, leaving no social security number on file with defendant if a religious exemption were granted. And if a person in that situation did not participate in later paternity or divorce proceedings and could not be located, support enforcement and collection could be problematic. As we stated above, one of the state interests is having in place a data-collection mechanism and network, a type of safety net if you will, to assist in locating individuals, establishing paternity, and enforcing support obligations with respect to future births and parental responsibilities. This was clearly considered by Congress because 42 USC 666(a)(13)(B) already requires parents to furnish social security numbers in divorce, support, and paternity proceedings. So to craft a safety net or data-collection mechanism and network for children who will be born in the future, as well as to protect existing children whose parents' whereabouts could become unknown at a later date or whose parents fail to participate in family court proceedings, Congress additionally required license applicants to furnish their social security numbers. 42 USC 666(a)(13)(A).

Plaintiff's religious beliefs conflict with any type of national identifier that could be used to assist in locating a parent, establishing paternity, enforcing support obligations, and collecting support. Furthermore, there is no other identifier or mechanism cited by plaintiff that could be used to promote the compelling state interests, much less one that would be as efficient in promoting those interests as a social security number. Granting a religious exemption to plaintiff and others similarly situated would substantially impair the state's interests because the goals of, and interests secured by, the social security number requirement simply cannot be promoted without the reporting of a social security number. Defendant has shown that there are no viable, acceptable alternative means that can be used to promote the compelling state interests.[8]

We acknowledge that granting one person a religious exemption, when viewed in comparison with the great multitude of license applicants who will report their social security numbers, will not cause the downfall of paternity and child support programs, sending them into chaos and turmoil. But the compelling state interest test should not succeed or fail on the basis of the number of people seeking an exemption, as viewed as a percentage of the total population. If that were the case,

[8] We note that virtually every jurisdiction that has addressed a claim that furnishing one's social security number violates religious free exercise rights has rejected the argument. Anno: *Free exercise of religion as applied to individual's objection to obtaining or disclosing social security number*, 93 ALR5th 1, § 2[a]; *Miller v Reed*, 176 F3d 1202, 1206-1207 (CA 9, 1999); *Kasler v Howard*, 323 F Supp 2d 675, 680 (WD NC, 2003); *Stoianoff v Comm'r of Motor Vehicles*, 107 F Supp 2d 439, 449-450 (SD NY, 2000); *Mefford v White*, 331 Ill App 3d 167, 174-178; 770 NE2d 1251 (2002); *Kocher v Bickley*, 722 A2d 756, 761-762 (Pa Commonwealth, 1999); *McDonald, supra* at 885-886; *State v Loudon*, 857 SW2d 878, 882-883 (Tenn Crim App, 1993); *Terpstra v State*, 529 NE2d 839, 843-847 (Ind App, 1988); *Penner v King*, 695 SW2d 887, 890 (Mo, 1985).

the test would essentially be rendered meaningless and would rarely, if ever, be satisfied, given that, as stated by the Supreme Court in *People v DeJonge (After Remand)*, 442 Mich 266, 282; 501 NW2d 127 (1993), the "major benefactors [of free exercise rights] are religious *minorities or dissidents* whose beliefs and worship are suppressed or shunned by the *majority*." (Emphasis added.) Furthermore, granting the requested religious accommodation and otherwise allowing religious exemptions would compromise the government's ability to administer the support enforcement programs by creating information gaps in the network and databases,[9] and thus there is a compelling interest in the *uniform application* of the social security number requirement to license applicants. See *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*, 546 US 418, 435; 126 S Ct 1211; 163 L Ed 2d 1017 (2006) (claimed exemption can be denied when the state demonstrates a compelling interest in the uniform application of a particular program by showing that granting the requested religious exemption would compromise the government's ability to administer the program).

The fact that some license applicants need not furnish social security numbers, because federal law does not require them to have a social security number in the first place, does not demand that we recognize an exemption for plaintiff; he has a social security number, and there are no less restrictive or obtrusive means to promote the compelling state interests cited above.

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[9] The CSEPA, particularly 42 USC 654a(a), provides that

> [i]n order for a State to meet the requirements of this section, the State agency administering the State program under this part shall have in operation a single statewide automated data processing and information retrieval system which has the capability to perform the tasks specified in this section with the frequency and in the manner required by or under this part.

Accordingly, the religious-conviction exemption formerly found in MCL 257.307(13) does not provide relief to plaintiff under a theory based on Const 1963, art 1, § 4, nor does the constitutional provision, standing alone, entitle plaintiff to relief.

Next, plaintiff argues that defendant's actions violated his right to equal protection under Const 1963, art 1, § 2, which provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

The essence of plaintiff's argument is that he is not provided the same exemption as persons who do not have to report social security numbers because they do not have them. He claims that they are allowed to obtain a driver's license and he is not, unless he sacrifices his fundamental right to freely worship.

In *Brinkley v Brinkley*, 277 Mich App 23, 35; 742 NW2d 629 (2007), this Court, addressing an equal protection claim, stated:

> Both the federal and state constitutions provide that no person will be denied the equal protection of the law. The federal and state constitutional guarantees of equal protection are coextensive. *The constitutional guarantee of equal protection ensures that people similarly situated will be treated alike, but it does not guarantee that people in different circumstances will be treated the same.* [Citations omitted; emphasis added.]

See also *Morales v Parole Bd*, 260 Mich App 29, 49; 676 NW2d 221 (2003); *Wysocki v Felt*, 248 Mich App 346, 367; 639 NW2d 572 (2001).

"[E]qual protection does not require the same treatment be given those that are not similarly situated." *Alspaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 555; 634 NW2d 161 (2001).

Here, plaintiff, or anyone claiming that he or she need not report an existing social security number on a license application, is not similarly situated in relation to a person who does not have a social security number. Individuals who are exempt by law from obtaining a social security number cannot, of course, furnish a number that has never been given to them. In *Florida State Conference of the Nat'l Ass'n for the Advancement of Colored People v Browning (On Remand)*, 569 F Supp 2d 1237 (ND Fla, 2008), there was an equal protection challenge to a voter registration statute that required applicants who did not have driver's licenses to provide the last four digits of their social security numbers, even though applicants who did hold driver's licenses were not also required to provide the last four digits of their social security numbers. The federal district court, after first noting that equal protection only requires that states treat similarly situated people alike, ruled that "[b]ecause they have no driver's license, such applicants are not similarly situated with applicants who can provide a driver's license number." *Id.* at 1257.

Accordingly, we hold that plaintiff's equal protection claim fails.

Plaintiff next argues that it is unconstitutional for the state of Michigan to enter into a contract with the United States pursuant to the CSEPA if it results in a violation of federal and state constitutional rights. Plaintiff's argument relies on the Tenth Amendment of the United States Constitution, the Spending Clause, Const 1963, art 1, § 4, and *South Dakota v Dole*, 483 US 203; 107 S Ct 2793; 97 L Ed 2d 171 (1987). The Tenth

Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Spending Clause provides that "[t]he Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." US Const, art I, § 8. In *Dole, supra* at 206-208, the United States Supreme Court, addressing the power of Congress under the Spending Clause, stated:

> Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."
>
> * * *
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> The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may pro-

> vide an independent bar to the conditional grant of federal funds. [Citations omitted; alteration and internal omission in original.][10]

Plaintiff's argument focuses solely on the fourth restriction or limitation on Congress's spending power ("independent constitutional bar" limitation), claiming that the Tenth Amendment and Const 1963, art 1, § 4, are offended by Michigan's participation in the CSEPA. In *Dole*, the state of South Dakota brought an action that challenged the constitutionality of a federal act that conditioned receipt by states of federal highway funds on the adoption of a minimum drinking age of 21 years. The Court, explaining the nature of the "independent constitutional bar" limitation and the relevant cases, stated:

> These cases establish that the "independent constitutional bar" limitation on the spending power is not, as petitioner suggests, a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead, we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power. But no such claim can be or is made here. Were South Dakota to succumb to the blandishments offered by Congress and raise its drinking age to 21, the State's action

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[10] The *Dole* Court also indicated that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' " *Dole, supra* at 211. Plaintiff, while acknowledging this language, does not present an argument that the state of Michigan was effectively coerced into complying with the CSEPA.

> in so doing would not violate the constitutional rights of anyone. [*Dole, supra* at 210-211.]

The enactment of the CSEPA by Congress under the Spending Clause, and specifically in relation to the requirement that a driver's license applicant furnish his or her social security number, 42 USC 666(a)(13)(A), did not induce the state of Michigan to engage in unconstitutional activities relative to the free exercise of religion, given that MCL 257.307(1)(a), as applied to plaintiff and on its face, does not violate Const 1963, art 1, § 4, pursuant to our analysis above.

With respect to the Tenth Amendment, the *Dole* Court, rejecting the same argument proffered by plaintiff here, ruled:

> We have also held that a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants. In *Oklahoma v Civil Service Comm'n*, 330 U.S. 127; 67 S. Ct. 544; 91 L. Ed. 2d 794 (1947), the Court considered the validity of the Hatch Act insofar as it was applied to political activities of state officials whose employment was financed in whole or in part with federal funds. The State contended that an order under this provision to withhold certain federal funds unless a state official was removed invaded its sovereignty in violation of the Tenth Amendment. Though finding that "the United States is not concerned with, and has no power to regulate, local political activities as such of state officials," the Court nevertheless held that the Federal Government "does have power to fix the terms upon which its money allotments to states shall be disbursed." The Court found no violation of the State's sovereignty because the State could, and did, adopt "the 'simple expedient' of not yielding to what she urges is federal coercion. The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." [*Dole, supra* at 210 (citations omitted).]

Moreover, in *Kansas v United States*, 214 F3d 1196 (CA 10, 2000), the United States Court of Appeals for the Tenth Circuit, citing *Dole* in support, rejected a similar constitutional challenge to the CSEPA under the Spending Clause. See also *Michigan Dep't of State, supra* at 1233-1234.

Accordingly, we reject plaintiff's argument that Michigan's participation under the CSEPA constitutes an unconstitutional state-federal contract.

As a matter of law, plaintiff failed to establish a violation of his statutory rights under former MCL 257.307(13) of the Michigan Vehicle Code, failed to establish a violation of his religious rights under Const 1963, art 1, § 4, failed to establish a violation of his equal protection rights under Const 1963, art 1, § 2, and failed to establish an unconstitutional state-federal contract under the Spending Clause or the Tenth Amendment.

Affirmed.

CHURCH & CHURCH, INC v A-1 CARPENTRY

Docket No. 275823. Submitted July 10, 2008, at Detroit. Decided August 19, 2008. Approved for publication October 21, 2008, at 9:00 a.m.

Church & Church, Inc., brought an action in the Oakland Circuit Court against A-1 Carpentry, Fox Brothers Development Company, and others. Church had filed a lawsuit against a builder, Gemcraft Homes, Inc., following Gemcraft's failure to pay Church for building materials supplied for improvements to numerous properties. Church had recorded liens and mortgages on certain properties for which materials were furnished and sought foreclosure of its mortgages and liens, naming other lienholders, mortgagees, and those who otherwise had an interest in the properties as necessary defendants, including Fox Brothers and C & R Plumbing & Heating, Inc. This case was eventually consolidated in the trial court with several other cases in which contractors, subcontractors, and suppliers had also sued Gemcraft for, among other things, defaulting on mortgages and contracts or subcontracts for materials or services provided in connection with the construction of multiple properties. The consolidated cases contained numerous claims, cross-claims, and counterclaims, and various parties sought foreclosure on mortgages and liens on a multitude of properties. The court, Nanci J. Grant, J., eventually granted various motions for summary disposition, dismissed certain foreclosure suits and construction liens, and denied C & R's request to amend its complaints to add the Homeowner Construction Lien Recovery Fund as a party. Church appealed, by leave granted, the entry of summary disposition in favor of third-party defendants AKRS Properties Investment, LLC, and Ban Cassab, who obtained quitclaim deeds to some of the disputed properties following foreclosure by advertisement, as well as the dismissal of Church's claims seeking judicial foreclosure of its mortgages on five properties. Fox Brothers appealed, by leave granted, the entry of summary disposition in favor of Satish and Aarti Doshi with regard to a mortgage that Fox Brothers held on the Doshis' real property. C & R appealed, by leave granted, the grant of summary disposition in favor of the Doshis, discharging C & R's construction lien on the Doshis' property, and the denial of C & R's request to

amend its complaint to add a claim against the Homeowner Construction Lien Recovery Fund.

The Court of Appeals *held*:

1. Church released its construction liens on five properties owned by Gemcraft in exchange for mortgages on the properties in Church's favor before Gemcraft defaulted on the mortgages and Church sought judicial foreclosure against Gemcraft. Defendant Charter One Bank's mortgages on the same properties were recorded before Church's mortgages, and Charter One also sought judicial foreclosure against Gemcraft. However, before the suit was resolved, Charter One dismissed its foreclosure count and assigned and sold its interest to third-party defendant FGR Properties, LLC. FGR then foreclosed on the properties by advertisement, ultimately quitclaiming them to AKRS and Cassab. The trial court thereafter correctly dismissed Church's claim for foreclosure on the properties and granted summary disposition in favor of AKRS and Cassab. Because Charter One no longer was pursuing a claim for judicial foreclosure, the foreclosure by advertisement by FGR was not precluded under MCL 600.3204.

2. There was no violation of MCL 600.3105 and 600.3204, which prevent a mortgagee from simultaneously maintaining a lawsuit for judicial foreclosure and a foreclosure by advertisement because a double recovery could occur. Here there were two different mortgagees, Church and Charter One, pursuing two different mortgage debts on the same property and no problem with a double recovery of the same debt.

3. The trial court did make a determination that the Charter One mortgage had priority over Church's mortgage because it was recorded first and Church had knowledge of Charter One's mortgage.

4. The trial court properly held that under the facts of this case, the Doshis were bona fide purchasers of the parcel of property known as 7 Waltonshire. The only recorded mortgage between Fox Brothers and Gemcraft regarding the property was eventually satisfied by the sale of two other properties securing the mortgage. The Doshis purchased the property when Sterling Bank and Trust, which also held a mortgage on the property, foreclosed and sold it by advertisement while the Church suit was pending, and the Doshis received a covenant deed from Sterling Bank.

5. Because C & R did not name Sterling Bank as a party to its cross-complaint to foreclose on its construction lien on 7 Waltonshire even though it had knowledge that Sterling Bank had an interest in the property, the trial court did not err in

holding that C & R's claim of lien was extinguished under MCL 570.1117. For the same reason, it would have been futile to grant C & R leave to amend its complaint to add the Homeowner Construction Lien Recovery Fund as a party with regard to its claim.

Affirmed.

1. MORTGAGES — ELECTION OF REMEDIES.

A mortgagee may not pursue statutory foreclosure through advertisement with regard to a mortgage debt while at the same time maintaining a lawsuit for judicial foreclosure of the same mortgage debt; two mortgagees pursuing two different mortgages on the same property are not precluded from one pursuing judicial foreclosure and the other simultaneously pursuing statutory foreclosure (MCL 600.3105[2], 600.3204).

2. MORTGAGES — NOTICE OF DEFECTS IN TITLE — WORDS AND PHRASES — GOOD-FAITH PURCHASERS.

A conveyance of real estate that is not recorded as required by statute is void as against any subsequent purchaser in good faith and for a valuable consideration; a person takes in good faith if he or she takes without notice, actual or constructive, of a defect in the vendor's title; a person having knowledge of such facts as would lead an honest person, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate and who fails to make such inquiries is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed (MCL 565.29).

3. MECHANICS' LIENS — CONSTRUCTION LIENS — ACTIONS — ENFORCEMENT OF CONSTRUCTION LIENS.

The burden of proof is on a plaintiff to show compliance with statutory requirements necessary to establish a right of action to enforce a mechanic's lien; proceedings for the enforcement of a construction lien shall not be brought later than one year after the date on which the claim of lien was recorded; each person having an interest in the property shall be made a party to the action; until a lienholder files a cross-claim and notice of lis pendens in a pending suit, he or she has not begun the proceedings for the enforcement of the lien (MCL 570.1117).

4. MECHANICS' LIENS — CONSTRUCTION LIENS — HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND — LIMITATION OF ACTIONS.

A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure must join the Homeowner Construction Lien Recovery Fund in the

> foreclosure action within the period provided in MCL 570.1117(1) or be barred from recovery from the fund under the terms of the Construction Lien Act; proceedings for the enforcement of a construction lien and the foreclosure of any interest in the subject of the construction lien pursuant to 570.1117(1) shall not be brought later than one year after the date the claim of lien was recorded (MCL 570.1203[4]).

Carthew Chapman, PLLC (by *Paul Carthew* and *Lila Z. Nikollaj*), for Church & Church, Inc.

Howard and Howard Attorneys, P.C. (by *Matthew B. Woodworth*), for Charter One Bank.

Plunkett Cooney (by *Ernest R. Bazzana* and *Kurt Riedel*) for Satish and Aarti Doshi.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Kelley T. McLean*, Assistant Attorney General, for the Homeowner Construction Lien Recovery Fund.

Burchfield, Park & Pollesch, P.C. (by *Shari L. Pollesch*), for Fox Brothers Development Company.

Urbani & Marshall, P.C. (by *Anthony Urbani, II*), for C & R Plumbing & Heating, Inc.

Bernardi, Ronayne & Glusac, a Professional Corporation (by *Elise N. Reed*), for AKRS Properties Investment, LLC, Ban Cassab, and FGR Properties, LLC.

Before: METER, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM. Plaintiff, Church & Church, Inc. (Church), appeals by leave granted the trial court's entry of summary disposition in third-party defendants AKRS Properties Investment, LLC, and Ban Cassab's favor and the dismissal of plaintiff's claims seeking

judicial foreclosure of its mortgages on five real properties. Defendant Fox Brothers Development Company appeals by leave granted the trial court's entry of summary disposition in favor of cross-defendants Satish and Aarti Doshi (the Doshis) concerning a mortgage Fox Brothers held on the Doshis' real property. Defendant C & R Plumbing & Heating, Inc. (C & R), appeals, also by leave granted, the trial court's order of summary disposition in the Doshis' favor discharging C & R's construction lien on the Doshis' property and its denial of C & R's request to amend its complaint to add a claim against cross-appellee, the Homeowner Construction Lien Recovery Fund. We affirm.

This case finds its origin in a lawsuit filed by Church against a builder, Gemcraft Homes, Inc., for Gemcraft's failure to pay Church for building materials it had supplied to Gemcraft for improvements to numerous properties in southeast Michigan. Church recorded liens and mortgages on certain properties for which materials were furnished. Seeking foreclosure of its mortgages and liens in the lawsuit, Church named the other lienholders, mortgagees, and those who otherwise had an interest in the properties as necessary defendants in the lawsuit, including Fox Brothers and C & R.

This case was eventually consolidated in the trial court with several other cases in which contractors, subcontractors, and suppliers had sued Gemcraft for, among other things, defaulting on mortgages and defaulting on contracts or subcontracts for materials or services provided in connection with the construction of multiple properties. These consolidated cases contain numerous claims, cross-claims, and counterclaims, and various parties sought foreclosure on mortgages and liens on a multitude of properties in the proceedings. The present appeals concern themselves with several of these foreclosure claims.

CHURCH'S APPEAL

Relevant to this appeal, Church held construction liens on five properties owned by Gemcraft. Before initiation of this lawsuit, however, Church agreed to release its construction liens in exchange for the execution of mortgages on the properties in Church's favor. Gemcraft apparently defaulted on the mortgages, and the five properties were among those for which Church sought judicial foreclosure in its lawsuit against Gemcraft.

Defendant Charter One Bank (Charter One) also held mortgages on these five properties and had recorded its mortgages before Church's mortgages were recorded. Charter One was named as a defendant in Church's lawsuit and filed a cross-claim against Gemcraft for, among other things, breach of contract and additionally sought judicial foreclosure on the five properties.

In April 2004, before the Church lawsuit was resolved, Charter One dismissed the foreclosure count of its cross-claim against Gemcraft. Approximately one month later, Charter One assigned its interest in and sold its loans on the subject properties to third-party defendant FGR Properties, LLC (FGR). FGR thereafter foreclosed on the properties by advertisement, and the properties were ultimately quitclaimed to AKRS Properties Investment, LLC, and its owner/president Ban Cassab.

In 2006, Church filed a motion for partial summary disposition, asserting that it was entitled to judicial foreclosure of its mortgages on the five properties, that the sale of the properties by FGR did not extinguish plaintiff's interest in the properties, and that the foreclosure by advertisement should be declared void. The trial court ultimately granted AKRS and Cassab's coun-

termotion for summary disposition, dismissing Church's claims with respect to the five properties.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 661; 645 NW2d 50 (2002). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim. *Smith v Globe Life Ins Co,* 460 Mich 446, 454; 597 NW2d 28 (1999). When reviewing a motion under this subrule, the court must consider all the documentary evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

On appeal, Church contends that MCL 600.3204 provides for foreclosure by advertisement (otherwise known as statutory foreclosure) only if that party has not already sued on the underlying debt. According to Church, Charter One's cross-claim against Gemcraft for breach of contract is an action to recover the debt secured by the mortgages and Charter One's dismissal of only the judicial foreclosure claim precluded FGR, pursuant to MCL 600.3204, from foreclosing on the properties by advertisement. We disagree.

MCL 600.3204(1) provides as follows:

> A party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued;

> or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

There is no question that Charter One filed a cross-complaint against Gemcraft for breach of contract because of Gemcraft's default on mortgages and loan documents concerning the properties at issue and for foreclosure of the mortgages held on the properties. However, Charter One dismissed its foreclosure claim and thereafter assigned its interest in and sold its loans on the subject properties to FGR. Despite Church's contrary contention, Charter One's actions in divesting itself of any and all rights, title, and interest in the subject properties acted as an implied dismissal of all its claims concerning the properties.

In *Saph v Auditor General*, 317 Mich 191, 202; 26 NW2d 882 (1947), an individual, who brought an action to cancel taxes on real property he held, deeded the property to another during the pendency of the lawsuit. Noting that the plaintiff had divested himself of all title and interest in the property involved in the lawsuit, our Supreme Court declared, "[a] court of equity will not permit a party who has voluntarily divested himself of any claim to continue litigating." Our Supreme Court has previously held that with regard to a party's assignment of his or her interest in a property that was the subject of a lawsuit, while not operating strictly as an abatement of the lawsuit, "its effect was much the same, as it left no party complainant before the court competent to prosecute it." *Webster v Hitchcock*, 11

Mich 56, 58 (1862). The Court faced a similar situation in *Brewer v Dodge*, 28 Mich 359, 360-361 (1873):

> It appears from complainant's own showing that in June 1870, he conveyed the premises in dispute to one Charles E. Ritson. Ritson never made himself a party to the suit. By that conveyance complainant ceased to have any further interest in the controversy. If any one was injuriously affected by any subsequent proceedings, it was Ritson, and not complainant. It was no concern of his after he had sold out all his interest. A court of equity must have the real parties before it, and will not permit a party who has voluntarily divested himself of any claim on his own behalf, to continue litigating. As soon as a complainant assigns his rights, the suit, as to him, ceases, and becomes as defective for want of a complainant as if it had abated by his death.

Here, Charter One dismissed its foreclosure claim. The breach of contract action was based on Gemcraft's failure to pay the mortgages—the same basis as the foreclosure claim. When Charter One assigned the mortgages and all of its rights, title, and interest as mortgagee to FGR, it no longer had any interest whatsoever in the mortgages. The breach of contract claim being based on the mortgage documents, and Charter One no longer having an interest in the mortgages, Charter One had no claim to continue pursuing against Gemcraft.

That a party has divested itself of interest in the real property that is the subject of the lawsuit does not, however, require dismissal of the lawsuit. As indicated by Church, Charter One could have continued with the breach of contract claim against Gemcraft—the operative word here being "could." MCR 2.202(B) governs the substitution of parties when there has been a transfer or change of interest and provides, in relevant part:

> If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court, on motion supported by affidavit, directs that the person to whom the interest is transferred be substituted for or joined with the original party, or directs that the original party be made a party in another capacity.

Notably, the use of the term "may" instead of "shall" in this court rule indicates discretionary rather than mandatory action. *Murphy v Ameritech,* 221 Mich App 591, 600; 561 NW2d 875 (1997). Thus, Charter One, as the original party, *could* have continued in the breach of contract action. There is no allegation, however, that any action on the breach of contract claim continued after Charter One assigned the mortgages to FGR, and there is no assertion that anyone moved to have FGR added or substituted as a party. Charter One's claim for breach of contract could thus be deemed discontinued, and FGR was free to pursue foreclosure by advertisement pursuant to MCL 600.3204.

Church next asserts that the foreclosure by advertisement should have been declared void, because Michigan law does not allow for foreclosure by advertisement of a property when a judicial foreclosure on the same property is pending. We disagree.

We would first note that Church stipulated the dismissal of all its claims against FGR. FGR having been the party who foreclosed on the properties through advertisement, it is questionable whether Church's claims of an invalid foreclosure by advertisement have any merit. Nevertheless, we will address the argument.

The right to foreclosure by advertisement is statutory. *Calaveras Timber Co v Michigan Trust Co*, 278 Mich 445, 450; 270 NW 743 (1936). Such foreclosures are a matter of contract, authorized by the mortgagor,

and ought not be hampered by an unreasonably strict construction of the law. *Cramer v Metro S&L Ass'n*, 401 Mich 252, 261; 258 NW2d 20 (1977). Harsh results may and often do occur because of mortgage foreclosure sales, "but we have never held that because thereof, such sale should be enjoined, when no showing of fraud or irregularity is made." *Calaveras Timber Co, supra*, at 454.

Church contends that it was the intent of the Michigan Legislature, in enacting MCL 600.3201 *et seq*., to promote the election of remedies involving foreclosures of the same property. Church cites no law, however, to support this assertion. Moreover, that is not an entirely correct statement regarding the purpose of the statute:

> The [precursor] statute [to MCL 600.3204] forbids the beginning of a statutory foreclosure if any "suit or proceeding shall have been instituted at law, to recover the debt then remaining secured" unless "the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part." [1871 CL] 6913. This statute clearly refers to suits on the debt, and not to foreclosure proceedings on the mortgage, and its object is to prevent proceedings, at the same time to prosecute the personal liability of the mortgagor and pursue the land. It is to prevent a simultaneous double vexation, which was allowed in England, but not generally here. [*Lee v Clary*, 38 Mich 223, 227 (1878).]

According to *United States v Leslie*, 421 F2d 763, 766 (CA 6, 1970), "[t]he language of Lee v. Clary is unmistakably clear that it is the purpose of the statute to force an election of remedies which if not made would create the possibility that the mortgagee could foreclose the mortgage and at the same time hold the maker of the note personally liable for the debt. *Accord*, Larzelere v. Starkweather, 38 Mich. 96, 105 (1878)."

More correctly stated, then, the intention of the Legislature with respect to the foreclosure statutes was to force an election of remedies by a mortgagee concerning a single debt: i.e., the same mortgagee cannot simultaneously maintain a lawsuit for judicial foreclosure and a foreclosure by advertisement, because it would allow for double recovery on the same debt. The statute thus serves to protect the mortgagor—not another mortgagee, as argued by Church.

Here, there is no election of remedy issue because Charter One and Church are two different mortgagees pursuing two different mortgage debts. There is no concern, then, that the mortgagor would be forced to pay a double recovery on the same debt. Moreover, we are directed to no authority that limits one mortgagee's remedy election to that chosen by a separate mortgagee.

That the Legislature intended to limit foreclosure proceedings in the manner suggested by Church is also not borne out by the statutory language in the foreclosure statutes. MCL 600.3204 provides that a party may foreclose if a default on *the* mortgage has occurred and an action at law has not been instituted to recover *the* debt secured by *the* mortgage or the action or proceeding has been discontinued. Use of the word "the" rather than "a" suggests that the Legislature did not concern itself with multiple mortgagees pursuing different debts secured by the same property.

MCL 600.3105(2), which governs judicial foreclosures, similarly provides:

> After a complaint has been filed to foreclose a mortgage on real estate or land contract, while it is pending, and after a judgment has been rendered upon it, no separate proceeding shall be had for the recovery of the debt secured by the mortgage, or any part of it, unless authorized by the court.

By its terms, MCL 600.3105 only prohibits a separate proceeding for recovery of a debt secured by a mortgage if a proceeding has already been initiated to recover the same debt secured by the same mortgage. Again, use of the word "the" before "debt" and "mortgage" limits a party holding a single debt secured by a single mortgage to the election of either judicial or statutory foreclosure by advertisement to prevent double recovery on the same debt.

Additionally, Church was not left without recourse because of FGR's election of foreclosure by advertisement. Church has not contended that it was unaware of the foreclosures by advertisement. In fact, an FGR representative submitted an affidavit indicating that during its negotiations with Charter One to obtain the properties at issue, he was in regular contact with Church's counsel and advised counsel of FGR's intent to purchase the properties. The foreclosure of the properties was thereafter held by advertisement. Church, then, could have sought to enjoin the sales in court, or could also, as it did here, have sought to have the foreclosures declared void. It could also have redeemed the properties after the foreclosures within the redemption period, because a junior mortgagee retains the right to redeem from the mortgage sale by paying the amount due on the senior mortgage with interest. See, e.g., *Titus v Cavalier*, 276 Mich 117, 120; 267 NW 799 (1936).

Church also argues that priority of its and Charter One's mortgages on the properties was an unresolved issue in the judicial action, so that the foreclosure by advertisement was inappropriate. Church asserts that it is not asking this Court to determine priorities, but that the proper forum for such a determination is in the lower court. The trial court, however, *did* address and

resolve the issue of priority in its October 11, 2006, opinion and order. The trial court noted:

> . . . Plaintiff does not dispute that the interest it seeks to enforce in this action was acquired after the Bank acquired and recorded its mortgage. Rather, Plaintiff argues that its claim should be treated as if it predated the Bank's claim under the doctrine of equitable subrogation. This Court disagrees. Plaintiff had an opportunity to ensure that its claim was superior to the bank's, but chose to subordinate its claim by converting it to a mortgage and recording if after the bank recorded its mortgage. In this context, equitable subrogation is not appropriate.

According to the trial court, then, there was no cognizable dispute regarding priority. Church was well aware that it recorded its mortgages on the properties after Charter One recorded its mortgages and thus possessed mortgages junior to those of Charter One. The holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers. *Richards v Tibaldi*, 272 Mich App 522; 726 NW2d 770 (2006). Church's argument (here and in the trial court) that its admittedly discharged construction liens should somehow be construed as having priority is without support. There being no priority dispute with regard to the mortgages held by Church and Charter One and there being no dispute regarding the amount of the mortgages, we affirm.

FOX BROTHERS' APPEAL

Fox Brothers' appeal concerns a single parcel of property, known as 7 Waltonshire, that was originally owned by Gemcraft and for which Gemcraft served as general contractor. According to Fox Brothers, Gemcraft granted it a mortgage on this property in the amount of $47,000 to secure its credit account with Fox

Brothers (which provided windows, siding, and roofing on several of Gemcraft's projects). The mortgage was recorded in 2001 and provides that the mortgage is intended to secure the payment under the mortgage note of the sum of $47,000. A promissory note executed on the same date as the mortgage provides that "[t]his Mortgage Note is secured by a mortgage granting security interest in three (3) parcels of land" and describes the three parcels, one of which is 7 Waltonshire.

In January 2003, Gemcraft and Fox Brothers entered into a security agreement whereby Fox Brothers agreed to release a secured interest on one of the three properties referenced in the promissory note and Gemcraft agreed, in turn, to amend the secured interest Fox Brothers had on the other two properties referenced in the promissory note so that Fox Brothers was secured against *each* property separately in the amount of $47,000, with such amendment retroactive to the initial date of the promissory note. In March 2003, a first amended mortgage note and mortgage reflecting this agreement were executed. Neither of the amended documents was recorded.

Sterling Bank and Trust also held a mortgage on 7 Waltonshire and foreclosed on the same by advertisement while the Church lawsuit was pending. Sterling Bank then sold 7 Waltonshire to the Doshis by covenant deed. The Doshis then became involved in the lawsuit, and summary disposition motions were eventually brought by parties with claims against 7 Waltonshire, including a motion by Fox Brothers seeking a ruling that it may foreclose on the property. The Doshis, however, claimed that the terms of the 2001 agreement between Gemcraft and Fox Brothers were satisfied and that any claim of an interest in 7 Waltonshire by Fox

Brothers was thus discharged. The Doshis further claimed that they were bona fide purchasers with respect to the 2003 unrecorded amended mortgage and note between Gemcraft and Fox Brothers. The trial court granted summary disposition in favor of the Doshis, finding that they were bona fide purchasers for value of 7 Waltonshire.

Fox Brothers now contends that because the Doshis purchased 7 Waltonshire from Sterling Bank well after the Fox Brothers recorded their original mortgage on the property, the Doshis, were on notice of an interest held by Fox Brothers in the property and could not be bona fide purchasers for value with regard to Fox Brothers. We disagree.

Michigan's race-notice statute provides:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof. [MCL 565.29.]

This section applies to mortgages. *Michigan Fire & Marine Ins Co v Hamilton,* 284 Mich 417, 419; 279 NW 884 (1938).

A person takes in "good faith" if he or she takes without notice of a defect in the vendor's title. *Michigan Nat'l Bank & Trust Co v Morren,* 194 Mich App 407, 410; 487 NW2d 784 (1992). "Notice" in the context of real estate law can be actual or constructive and has been defined by our Supreme Court as follows:

> When a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Kastle v Clemons,* 330 Mich 28, 31; 46 NW2d 450 (1951).]

There is no question that Fox Brothers and Gemcraft were free to amend or extend their agreement concerning the debt owed Fox Brothers and the mortgage securing the debt. "It is well settled by the weight of authority that the parties to a mortgage originally intended to secure a particular debt may extend the security to the payment of a different debt or future advances as far as their respective rights are concerned." *Riess v Old Kent Bank*, 253 Mich 557, 562-563; 235 NW 252 (1931). The note, then, for additional debt could certainly be enforceable against Gemcraft. The issue presented here, however, is the effect on a third party of an unrecorded change to the debt.

The original mortgage and note indisputably provided for the payment of a single $47,000 debt, which was secured by interests in three parcels of land, one of which was 7 Waltonshire. The mortgage being duly recorded in 2001, the Doshis purchased 7 Waltonshire subject to the 2001 mortgage. However, because the 2003 mortgage and underlying note that expanded the debt were not recorded, the Doshis had no actual notice of such change. Fox Brothers argues that because the original mortgage was recorded and this litigation was pending, the Doshis should have made inquiry into the debt underlying the mortgage and litigation to determine whether the debt remained the same. However, Fox Brothers provides no authority suggesting that the Doshis had a legal duty to undertake such an inquiry. Because the Doshis received a covenant deed from

Sterling Bank and the amended mortgage was not recorded as required by statute, and because the fact that a lawsuit was pending, absent any suggestion that the Doshis knew or should have suspected that the pending litigation involved anything other than what was contained in the public record, would not serve to give the Doshis constructive notice, we affirm the trial court's finding that the Doshis were bona fide purchasers for value of 7 Waltonshire with respect to the amended mortgage. The amended mortgage is thus void as against the Doshis.

In addition, because the only mortgage enforceable against the Doshis provided for a single $47,000 debt secured by 7 Waltonshire and two other properties and it is undisputed that Fox collected more than $47,000 from the sale of the other two properties, the first mortgage could be construed as paid in full and thus discharged.

C & R'S APPEAL

C & R's claim on cross-appeal also relates solely to 7 Waltonshire. C & R was hired by Gemcraft to install rough plumbing and plumbing fixtures in a number of Gemcraft's projects, including 7 Waltonshire. C & R received partial payment from Gemcraft for its services on 7 Waltonshire and recorded a lien against the property on August 20, 2002, for the outstanding balance of $7847.50. C & R was named in the Church lawsuit as a defendant and as an interest holder in 7 Waltonshire and filed a cross-claim for foreclosure on its construction lien.

The Doshis eventually moved for summary disposition, seeking to discharge all construction liens on 7 Waltonshire, asserting, with respect to C & R's lien, that it did not timely file its foreclosure action, thereby

barring enforcement of its lien pursuant to MCL 570.1117. C & R offered no response to this particular argument, but moved to amend its complaint to add a claim against the Homeowner Construction Lien Recovery Fund. See MCL 570.1201. The trial court granted summary disposition in the Doshis' favor and discharged C & R's lien, noting that because C & R did not address the statute of limitations argument, summary disposition based on the statute of limitations was appropriate. The trial court also denied C & R's request to amend its complaint. We affirm.

MCL 570.1117 states, in relevant part:

> (1) Proceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded.
>
> * * *
>
> (4) Each person who, at the time of filing the action, has an interest in the real property involved in the action which would be divested or otherwise impaired by the foreclosure of the lien, shall be made a party to the action.

Until a lienholder files a cross-claim and notice of lis pendens in a pending suit, he has not begun the proceedings required by statute for the enforcement of his liens. *L J Mueller Furnace Co v Wayne Circuit Judge*, 226 Mich 672; 198 NW 248 (1924). The burden of proof is on a plaintiff to show compliance with statutory requirements necessary to establish a right of action to enforce a mechanic's lien. *Skyhook Lift-Slab Corp v Huron Towers, Inc*, 369 Mich 36; 118 NW2d 961 (1963).

Here, it is undisputed that C & R recorded an amended construction lien with respect to 7 Walton-

shire on August 20, 2002. It is also undisputed that on February 28, 2003, Clinton Valley Title Company recorded an affidavit of lost document, indicating that a mortgage loan had previously been closed by Gemcraft in favor of Sterling Bank and Trust on 7 Waltonshire. It is further undisputed that C & R filed its cross-complaint seeking foreclosure of its construction lien on 7 Waltonshire on June 6, 2003, and did not name Sterling Bank as a party in its complaint. The above being true, the court action to foreclose on the lien was not effective with respect to the real interests of unnamed parties that should have been named (Sterling Bank). This results in extinguishing C & R's claim of lien because any future foreclosure action would be beyond the one-year limitations period under the Construction Lien Act. MCL 570.1117. The trial court's ruling with respect to C & R's lien on 7 Waltonshire is thus affirmed.

With respect to C & R's argument that it should have been granted leave to amend its complaint, we note that this Court will reverse a trial court's decision on a motion to amend a complaint only where the trial court abused its discretion. *Dampier v Wayne Co*, 233 Mich App 714, 721; 592 NW2d 809 (1999). Leave to amend a complaint should be freely given when justice so requires. MCR 2.118(A)(2). Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Phinney v Perlmutter*, 222 Mich App 513, 523; 564 NW2d 532 (1997).

The Homeowner Construction Lien Recovery Fund (MCL 570.1201) was created to address the situation

where potential lien claimants have done everything required of them under the Construction Lien Act, MCL 570.1101 *et seq*., but are precluded from recovering because of, for example, a homeowner's prior payment to a contractor. *Erb Lumber, Inc v Gidley*, 234 Mich App 387, 394; 594 NW2d 81 (1999). In such situations, they may recover the amount of their lien from the Homeowner Construction Lien Recovery Fund. *Id*. To that end, MCL 570.1203(4) provides:

> A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure shall join the fund as a defendant in the foreclosure action within the period provided in section 117(1). The subcontractor, supplier, or laborer shall serve a summons and complaint on the office of the fund administrator within the department by certified or registered mail or by leaving a copy at the office. The failure to serve a summons and complaint under this subsection bars recovery from the fund. After a defendant is served with a summons and complaint in an action to foreclose a construction lien, the department may intervene in the action as a party defendant with respect to other construction liens.

Section 117(1) provides that "[p]roceedings for the enforcement of a construction lien and the foreclosure of any interests subject to the construction lien shall not be brought later than 1 year after the date the claim of lien was recorded." MCL 570.1117(1).

While C & R filed its cross-complaint seeking foreclosure of its construction lien on 7 Waltonshire within one year of when it recorded the lien, C & R does not dispute that it failed to name the Homeowner Construction Lien Recovery Fund as a party in its initial cross-complaint. Because MCL 570.1117 serves as a statute of limitations and unequivocally requires that the fund be named as a party within that limitations period, and the

limitations period for bringing a claim against the fund had passed, it would be futile for the trial court to have granted C & R's motion to add the fund as a party.

Affirmed.

In re APPLICATION OF CONSUMERS ENERGY COMPANY

Docket No. 274471. Submitted February 5, 2008, at Lansing. Decided October 21, 2008, at 9:05 a.m.

Consumers Energy Company filed an application with the Public Service Commission (PSC) for the approval of a power supply cost recovery (PSCR) plan and the authorization of PSCR factors for calendar year 2006. The Michigan Environmental Council (MEC) and the Public Interest Research Group In Michigan (PIRGIM) intervened and offered evidence concerning opportunities to reduce the PSCR factors through conservation, energy efficiency, and demand-side management. A hearing referee struck the evidence and corresponding advocacy from MEC and PIRGIM, ruling that the evidence was not properly before the PSC in the PSCR proceeding. MEC and PIRGIM appealed the referee's determination to the PSC, contending that a PSCR plan that does not address the matters for which they sought to introduce evidence was neither reasonable nor prudent for purposes of the requirements for PSCR plans stated in MCL 460.6j. The PSC affirmed the referee's determination. MEC and PIRGIM appealed.

The Court of Appeals *held*:

1. The PSC did not err in declining to condition approval of Consumers' PSCR plan on the existence of energy resource planning, efficiency, and conservation programs that the appellants sought to have included in the plan. Although MCL 460.6j requires the PSC to generally review for reasonableness and prudence a plan put forward by a utility, the statutory language does not imply that the PSC should use the PSCR process to require a utility to respond to an intervenor's recommendations, or require any specific programs intended to promote conservation, energy efficiency, or demand-side management.

2. The PSC did not err when, in 1997, it discontinued requiring that integrated resource plans or demand-side management programs be included in PSCR requests. The PSC did not err in declining to treat the PSCR plan in this case as unreasonable or imprudent because it did not include such plans or programs. This holding is supported by the facts that MCL 460.6j does not demand particular plans of the sort the appellants advocate, the PSC is not

bound by a single formula or method and continues to expect utilities to engage in reasonable and prudent planning activities, and the PSC has indicated that the arguments of the appellants could be addressed in other proceedings.

3. The PSC properly refused to entertain the evidence that relates to matters that the Court of Appeals determined were not required to be considered as part of Consumers' PSCR plan.

Affirmed.

PUBLIC UTILITIES — POWER SUPPLY COST RECOVERY PLANS.

The Public Service Commission need not require a public utility to include in a power supply cost recovery request an integrated resource plan or a demand-side management program; the commission must generally review the reasonableness and prudence of utilities' power supply cost recovery plans but is not bound by any single formula or method and need not require any specific programs intended to promote conservation, energy efficiency, or demand-side management (MCL 460.6j).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *David A. Voges* and *Michael A. Nickerson*, Assistant Attorneys General, for the Public Service Commission.

Clark Hill PLC (by *Don L. Keskey*) for the Michigan Environmental Council and the Public Interest Research Group In Michigan.

Jon R. Robinson and *John C. Shea* for Consumers Energy Company.

Before: MARKEY, P.J., and METER and MURRAY, JJ.

METER, J. Appellants Michigan Environmental Council and Public Interest Research Group In Michigan appeal as of right an order of the Public Service Commission (PSC) denying leave to appeal the decision of a hearing referee not to entertain certain advocacy from appellants and to strike their attendant evidence. We affirm.

I. FACTS

This case arose from the PSC's orders in response to an application by Consumers Energy Company (Consumers) for approval of a power supply cost recovery (PSCR) plan for 2006.

A PSCR factor is "that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility." MCL 460.6j(1)(b). A PSCR clause is

> a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices. [MCL 460.6j(1)(a).]

Appellants entered this case as intervenors[1] and offered evidence concerning opportunities to reduce the PSCR factors through conservation, energy efficiency, and demand-side management (DSM). Consumers persuaded the referee to strike that evidence as not properly before the PSC in a PSCR proceeding. In response to the motion to strike, appellants unsuccessfully sought a declaratory ruling to the effect that the development of energy efficiency, conservation, and load management programs was a duty that Consumers was obliged to fulfill as part of the PSCR process.

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[1] Michigan Power Limited Partnership and Ada Cogeneration Limited Partnership also entered this case as intervenors, but did not participate beyond the prehearing stage. Accordingly, those parties are not participating in this appeal.

Appellants argued that Consumers' PSCR plan should be rejected because it failed to address energy efficiency, conservation, or load management programs, asserting that a plan failing to address those items was neither reasonable nor prudent for purposes of MCL 460.6j. Appellants additionally argued that the stricken testimony would have shown the direct relationship between prudence under MCL 460.6j and energy efficiency, and that the testimony was therefore relevant in the PSCR proceeding. Appellants further argued that the denial of the motion for declaratory relief was contrary to the plain language, purposes, and objectives of MCL 460.6j because any PSCR plan that did not address opportunities to minimize energy costs was necessarily unreasonable and imprudent.

In affirming the referee's decision to strike the evidence in question, the PSC explained:

> The [referee] correctly rejected the motion for a declaratory ruling on the grounds that "the overall structure of the Commission's rules of practice and procedure rebuts MEC/PIRGIM's assertion that its request can and should be considered in the context of an existing case." None of the rulings that the groups seek are necessary to decide the contested case proceeding at hand. As the [referee] found, "Consumers is currently under no obligation to include (as part of its 2006 PSCR plan or the accompanying five-year forecast) an assessment of energy efficiency, conservation, or DSM programs."
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> * * *
>
> [T]he Commission agrees that the [referee] did not err by striking the testimony offered by MEC/PIRGIM witnesses concerning the need for conservation, energy efficiency, and DSM programs. However, in affirming the [referee's] ruling on the motion to strike the Commission notes that it does not intend to suggest that a party to an

> Act 304[2] case should be precluded from proposing a rate design solution that encourages the efficient use of energy or conservation measures by a utility's customers. Likewise, the preclusion of intervenor testimony regarding non-rate design energy efficiency or conservation measures in an Act 304 proceeding does not apply to more appropriate forums, such as individual rate cases or special proceedings. . . . MEC/PIRGIM is encouraged to raise its energy efficiency and conservation concerns in a more appropriate forum . . . . [Citations omitted.]

This appeal followed.

II. STANDARDS OF REVIEW

A final order of the PSC must be authorized by law and must be supported by competent, material, and substantial evidence. Const 1963, art 6, § 28; *Attorney General v Pub Service Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). All rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed to be lawful and reasonable. MCL 462.25; see also *Michigan Consolidated Gas Co v Pub Service Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, an appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

In situations not involving the interpretation of a statute, a reviewing court should defer to the PSC's

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[2] "Act 304" refers to 1982 PA 304, which is the legislation authorizing the use of a PSCR clause, MCL 460.6j.

administrative expertise and not substitute its judgment for that of the PSC. *Attorney General v Pub Service Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). An agency's interpretation of a statute, while entitled to " 'respectful consideration,' " "is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 93, 103; 754 NW2d 259 (2008).

"Whether the PSC exceeded the scope of its authority is a question of law that we review de novo." *In re Complaint of Pelland Against Ameritech Michigan*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

Evidentiary decisions are reviewed for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion occurs only where the challenged decision fell outside the range of reasonable and principled outcomes. See *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

III. RESOURCE PLANNING

Appellants first assert, according to their statement of questions presented, that the PSC declared itself "limited and powerless under statutory law to encourage the establishment of energy resource planning, and energy efficiency and conservation programs," and they then argue that the PSC erred in so declaring. In fact, we find no such declaration in the record. The PSC did, however, decline to condition approval of Consumers' PSCR plan on the existence of such a program within it, and in this regard it committed no error.

The parties recognize that the PSC has a long history of encouraging utilities to consider their options for providing energy, satisfying present and future demand,

and respecting concerns relating to costs, conservation, risks, and flexibility, along with environmental and social issues. In 1990, the PSC held that, in order to evaluate the reasonableness and prudence of the decisions underlying PSCR plans and forecasts, Consumers' future PSCR plans and forecasts would have to be derived from, and be consistent with, its most recent integrated resource plan (IRP). *In re Application of Consumers Power Co*, opinion and order issued March 29, 1990 (Case No. U-9172), p 23. The PSC elaborated that an IRP should include planning objectives, estimated costs of and potential contributions to meeting planning objectives in connection with resource options, load projections and resource requirements, combinations of resource options, sensitivity analyses testing the effect of changed circumstances on the performance and costs of selected resource options, and an action plan describing a preferred selection of resource options. *Id.* at 24-25.

However, in 1997, with the advent of competition in the state's electric industry, the PSC relieved utilities of the requirement that their PSCR requests include IRPs:

> In recognition of its goal of increased competition in Michigan's electric industry, the Commission concludes that Consumers should no longer be required to file integrated resource plans. Public review of and comment on integrated resource plans are not consistent with the competitive electric industry environment envisioned for Michigan. Such plans might provide information that could be useful to potential competitors and thus create a competitive disadvantage for Consumers. [*In re Application of Consumers Power Co*, order entered January 28, 1997 (Case No. U-9172), pp 1-2.]

However, the PSC added, "In relieving Consumers of the obligation to file integrated resource plans, the

Commission does not indicate that Consumers is also relieved of its obligation to engage in reasonable and prudent planning activities." *Id*. at 2.

In the instant case, the PSC reiterated that it imposed no obligation on Consumers to include an assessment of energy efficiency, conservation, or DSM programs with its PSCR plan, but it also stated that Consumers nonetheless retained an obligation to engage in reasonable and prudent planning activities, and it encouraged appellants to raise their "energy efficiency and conservation concerns in a more appropriate forum." The PSC thus expressed its openness to taking appellants' evidence and to encouraging Consumers to engage in scrupulous resource planning generally, even if not in the context of a PSCR proceeding. The real issue, then, despite appellants' failure to frame it this way, is whether the PSC erred in declining to require that Consumers include an IRP or DSM program as part of its PSCR request.

Appellants acknowledge that that the PSC years ago discontinued its practice of requiring planning programs as part of PSCR plans, but they do not assert explicitly that that policy change was ill-advised and they do not discuss the PSC's expressed concern that requiring the publication of the particulars of such programs would work against the competitive marketplace that a new legal framework was bringing about.[3]

As noted earlier, while an agency's interpretation of a statute is entitled to " 'respectful consideration,' " a

[3] We note that the federal Public Utility Regulatory Policies Act of 1978 encourages the development of alternative power sources in the form of cogeneration and small power production facilities and authorizes the promulgation of rules to require electric utilities to offer to purchase electricity from qualifying cogeneration facilities. 16 USC 824a-3(a)(2).

reviewing court may not abandon its responsibility to interpret statutory language and legislative intent. *In re Rovas Complaint*, *supra* at 93.

Although MCL 460.6j(1)(a) authorizes the establishment of a PSCR clause for recovering the costs of generating or otherwise obtaining power "under reasonable and prudent policies and practices," the statute calls on the PSC to generally review for reasonableness and prudence what a utility has put forward; the statutory language does not imply that the PSC should use the PSCR process to require a utility to respond to an intervenor's recommendations or require any specific programs intended to promote conservation, energy efficiency, or demand-side management.

The PSC is entitled to consider "all lawful elements" in determining rates. MCL 460.557(2); see also *Detroit Edison Co v Pub Service Comm*, 221 Mich App 370, 385; 562 NW2d 224 (1997). Moreover, "[t]he PSC is not bound by any single formula or method and may make pragmatic adjustments when warranted by the circumstances." *Id.* at 375. Accordingly, the PSC may authorize rates based on the reasonable costs of a DSM program, *id*. at 386, but may not "order [a] utility to follow particular principles of economic management," *id*. at 387.

Appellants point out that they were not purporting to impose on Consumers any specific plan, but were instead only suggesting that the PSC treat a PSCR plan that lacked any resource planning programs as unreasonable and imprudent on its face. Significantly, appellants do not otherwise purport to identify anything about the PSCR plan in question that renders it unreasonable or imprudent. Given that (1) MCL 460.6j does not demand particular plans of the sort appellants advocate, (2) the PSC is not bound by any single

formula or method, (3) the PSC continues to expect a utility to engage in reasonable and prudent planning activities, and (4) the PSC has demonstrated its openness to appellants' advocacy along those lines in other proceedings, we hold that the PSC was within its rights in discontinuing the requirement for IRPs or DSM programs with PSCR plans in the first instance and in declining to treat a PSCR plan as unreasonable or imprudent for want of such a plan in this instance.

IV. STRICKEN EVIDENCE

Appellants additionally argue that the PSC erred in striking certain testimony and exhibits they offered. We disagree.

The testimony in question related to the possible economic benefits that may be derived from conservation, energy efficiency, and DSM projects; Consumers' recent announcement that it would like to sell its Palisades nuclear plant during 2007 and buy back the facility's capacity and energy through a power purchase agreement; and appellants' assertion that Consumers should either stop collecting the surcharge mandated by the Nuclear Waste Policy Act of 1982, 42 USC 10101 *et seq*., or stop forwarding the funds thus collected to the United States Department of Energy for use in establishing and operating a permanent spent nuclear fuel repository.

A. CONSERVATION, ENERGY EFFICIENCY, AND DSM PROJECTS

Appellants argue that the PSC improperly upheld the referee's decision to strike testimony and exhibits they offered relating to conservation, efficiency, and DSM projects. Because we concluded above that the PSC was within its rights in declining to require such projects as

part of a PSCR plan, we conclude here that the PSC properly struck the evidence relating to them.[4]

B. PROPOSED SALE OF THE PALISADES PLANT

The referee, in the proposal for decision, explained:

> [T]he problem with MEC/PIRGIM's proposed testimony is not one of relevance, at least in the long term. [T]he [referee] concedes that "the effect that the actual sale of the plant and [the] successful signing of a Power Purchase Agreement might have on ratepayers is something that . . . could be investigated in the context of an Act 304 case." However, at the present time, no sale has occurred and no power purchase agreement has been negotiated—let alone approved by the Commission, as would likely be required pursuant to Section 6j(13) of Act 304. Instead, all we have is the utility's announcement that it would "like" to sell the plant at some time following the close of the PSCR plan year at issue in this proceeding. Thus, MEC/PIRGIM's currently proposed testimony on this issue—as well as any that might be obtained by requiring Consumers to supplement its current five-year forecast to include the effects of the plant's potential sale—constitutes pure speculation. [Citation omitted.]

The referee's reasoning is sound on its face, and appellants directly attack no part of it. Because a sale of the Palisades plant was only in the conceptual stages at the time, appellants' testimony concerning the implications of such a sale was properly stricken.

C. SPENT NUCLEAR FUEL

Appellants have repeatedly sought to make an issue of how utilities manage the problem of spent nuclear fuel. This Court has published a decision declaring that

[4] As noted by the PSC in this case, such evidence might be appropriate in an individual rate case.

the PSC properly refused to entertain appellants' advocacy in this regard. *In re Application of Indiana Michigan Power Co*, 275 Mich App 369, 374-380; 738 NW2d 289 (2007). Citing that case, this Court more recently disposed of such arguments without elaboration. *In re Application of Detroit Edison Co*, 276 Mich App 216, 240-241; 740 NW2d 685 (2007). In light of caselaw establishing that the PSC is not obliged to entertain appellants' proposals concerning spent nuclear fuel, the decision in this instance to strike the related evidence is unassailable.

Affirmed.

JOHNSON FAMILY LIMITED PARTNERSHIP v
WHITE PINE WIRELESS, LLC

Docket Nos. 278258 and 278695. Submitted October 14, 2008, at Grand Rapids. Decided October 30, 2008, at 9:00 a.m.

The Johnson Family Limited Partnership brought an action in the Grand Traverse Circuit Court against White Pine Wireless, LLC, and J.P.M.S., Inc. (JPMS), seeking reformation of a deed to a parcel of land that the plaintiff sold to JPMS so that restrictions that were contained in the purchase agreement are included in the deed. The plaintiff further sought a declaration that the restrictions apply to White Pine, who leased the property from JPMS, and that the construction of a cell tower and fencing on the property violate the restrictions at issue. The plaintiff and White Pine each moved for summary disposition. The court, Philip E. Rodgers, Jr., J., granted the plaintiff's motion, ruling that the plaintiff was entitled to reformation of the deed, that the doctrine of merger did not bar such reformation, that White Pine was not a bona fide purchaser, and that the cell tower constituted a "utility conduit" prohibited by the restrictions. The court entered a judgment reforming the deed to include the restrictions, enjoining the construction of a cell tower and a fence, and ordering that the cell tower and the fence, which by that time had been constructed, be removed. White Pine and JPMS appealed separately. The appeals were consolidated.

The Court of Appeals *held*:

1. The general rule is that courts will follow the plain language of a deed in which there is no ambiguity. However, the equitable power to reform a deed may be applied to an unambiguous deed where the deed fails to express the obvious intention of the parties. Therefore, the trial court could properly reform the unambiguous deed if the plaintiff established the necessary grounds for such equitable relief. The plaintiff did meet this burden in this case.

2. The equitable power to reform a deed is an exception to the application of the merger doctrine, which provides that a deed made in full execution of a contract for the sale of land is presumed to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading

up to the execution of the deed. The trial court could therefore properly consider the parties' prior negotiations and the purchase agreement in determining whether the deed accurately reflected the intent of the parties.

3. A deed may be reformed on the basis of mutual mistake and, under certain circumstances, on the basis of a unilateral mistake. The evidence in this case established a mutual mistake of law. The plaintiff and JPMS specifically intended the deed to contain the restrictions. Because the restrictions were omitted from the deed, the deed did not have the legal effect intended by the parties. The trial court properly determined that the deed did not reflect the actual intent of either party and should be reformed because of a mutual mistake.

4. Even if the mistake were a unilateral mistake by the plaintiff, reformation of the deed would still be warranted because the undisputed evidence supports an inference that JPMS knew that the plaintiff intended the deed to contain the restrictions, recognized that the restrictions had been omitted, and remained silent about the mistake.

5. The trial court did not err in determining that the plaintiff had not received a request for admissions by White Pine and, therefore, the requested admissions need not be deemed as having been made by the plaintiff.

6. There was no evidence presented that the cell tower contained "wires or conduits" in violation of the restrictions. The trial court prematurely determined that the cell tower violated the restrictions. The part of the order enjoining construction of the cell tower and ordering the removal on that basis must be reversed and the case must be remanded for a hearing regarding this issue. If the trial court determines that the cell tower does not constitute prohibited wires or conduits, then the court must determine if the cell tower constitutes an "unnatural improvement" in violation of the restrictions.

7. The trial court properly determined that the fence violated the restrictions and properly ordered its removal and enjoined the erection of any fencing.

8. White Pine only had an option to lease and, before it exercised that option, received actual notice regarding the restrictions. White Pine was not a purchaser in good faith without notice of a defect in the title.

9. The plaintiff acted as soon as practicable when learning that the deed did not contain the restrictions. The doctrine of laches does not bar reformation of the deed.

Affirmed in part, reversed in part, and remanded.

1. DEEDS — EQUITY — REFORMATION OF DEEDS.

The equitable power to reform a deed may be applied to an unambiguous deed where the deed fails to express the obvious intention of the parties.

2. DEEDS — MERGER DOCTRINE — EQUITY — REFORMATION OF DEEDS.

The equitable power to reform a deed is an exception to the doctrine of merger and allows the court to consider the parties prior negotiations and agreements in determining whether the parties' allegedly inaccurate deed reflects the intent of the parties.

3. DEEDS — MUTUAL MISTAKE — UNILATERAL MISTAKE — REFORMATION OF DEEDS.

A deed may be reformed on the basis of mutual mistake and, under certain circumstances, on the basis of a unilateral mistake.

4. VENDOR AND PURCHASER — OPTIONS TO LEASE — GOOD-FAITH PURCHASERS.

An option to lease does not transfer an interest in land until the option is exercised; a person who discovers that there are restrictions applicable to land after receiving an option to lease the land but before exercising the option is not, after exercising the option, a purchaser in good faith without notice of the restrictions.

Mark A. Hullman for the plaintiff.

Bishop & Heintz, P.C. (by *Steven R. Fox* and *Douglas S. Bishop*), for White Pine Wireless, LLC.

Tom H. Evashevski for J.P.M.S., Inc.

Before: O'CONNELL, P.J., and BANDSTRA and GLEICHER, JJ.

BANDSTRA, J. In this suit to reform a deed and enforce restrictions, defendants J.P.M.S., Inc. (JPMS), and White Pine Wireless, LLC (White Pine), appeal as of right the trial court's grant of summary disposition in favor of plaintiff, Johnson Family Limited Partnership (the Partnership). On appeal, the primary issues are

whether the trial court could properly reform an unambiguous deed to include omitted deed restrictions notwithstanding the doctrine of merger, whether the facts supported reformation of the deed at issue on the basis of mutual or unilateral mistake, and, if the trial court properly reformed the deed, whether White Pine's construction of a cell tower violated the restrictions. We conclude that the trial court properly reformed the deed to include the omitted restrictions, but that there was insufficient record evidence to support the conclusion that the cell tower constitutes wires or conduits within the meaning of the restrictions. For that reason, we affirm in part, reverse in part, and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In approximately 2000, JPMS began negotiations to purchase a parcel of real property owned by the Partnership. At the time, the Johnson Family Trust (the Trust) served as the general partner for the Partnership. In September 2000, the Trust entered into a purchase agreement to sell the property to JPMS. The Trust did not indicate whether it was signing on behalf of the Partnership.

The agreement provided that "[t]he Deed to be executed in conveyance of the Subject property shall contain" certain specified building and use restrictions that would be applicable "until Seller shall cease to own the property commonly known as Acme Village." Among the restrictions were the following:

> (j) No exterior lighting shall be installed on the property, which shall shine upon the street or any adjoining property without the approval of the Seller or his successor. No power, telephone or other utility wires or conduits shall be

> installed above ground on the property other than the currently existing power lines.
>
> (k) No statue, fence or other unnatural improvements shall be permitted on the Property without the approval of his [sic] Seller or successor.

Corporate Title Agency handled the closing, which occurred on December 13, 2000, with neither party in attendance. Jerome Jelinek, who is the president of Corporate Title Agency and an attorney, prepared the warranty deed for the closing. However, Jelinek did not include the restrictions on the deed. The warranty deed was recorded on December 29, 2000. After the closing, a hotel was built on the property. JPMS later leased the hotel to American Hospitality Management, which operates a Holiday Inn Express at the site.

On February 28, 2006, JPMS granted an option to lease a portion of the property at issue to White Pine. The option had a term of one year and could be exercised by paying $550 to JPMS. In March 2006, White Pine applied for a special use permit to construct a cell tower on the property. As a result of this application, the Partnership became aware of White Pine's plan to build a cell tower on the property the Partnership sold to JPMS. Shortly thereafter, the Partnership also learned its deed to JPMS did not contain the restrictions described in the purchase agreement. After the Partnership contacted the title company about the discrepancy in the deed, Jelinek prepared an affidavit listing the restrictions and indicating that the restrictions had been omitted from the deed. He also indicated that the affidavit was intended to correct the warranty deed to reflect the parties' intent. The affidavit was recorded on June 28, 2006.

In July 2006, the Partnership contacted the township regarding its belief that the land in question was subject

to restrictions. After the township forwarded the Partnership's letter to White Pine, White Pine acknowledged the claims in a letter to the township dated July 21, 2006. On August 1, 2006, the township approved the special use permit.

On September 6, 2006, the Partnership sued White Pine for declaratory and injunctive relief. On December 7, 2006, the Partnership amended its complaint to join JPMS. In the amended complaint, the Partnership asked the trial court to reform the deed so that a mutual mistake regarding the non-inclusion of the restrictions listed in the purchase agreement could be corrected, to declare that the restrictions properly apply to White Pine because White Pine had notice of the claimed restrictions before it exercised its option to lease, and to enjoin the construction of the cell tower.

On October 23, 2006, White Pine assigned its option to lease to SBA Towers, Inc. And, by December 13, 2006, SBA completed the construction of the cell tower and a fence around it.

On February 12, 2007, White Pine moved for summary disposition. White Pine argued that the restrictions did not apply to the property because they were not part of the recorded deed, which must be enforced as written, and that consideration of any previous negotiations or agreements was barred under the doctrine of merger. It further argued that JPMS never intended to create deed restrictions on the property. It also contended that it was a bona fide purchaser for value and, therefore, not bound by unrecorded deed restrictions. White Pine also argued that, even if the deed restrictions were to apply, the cell tower did not violate any of the deed restrictions. Finally, White Pine argued that it would be inequitable for the trial court to enforce the deed restrictions against it under the circumstances.

On March 8, 2007, the Partnership also moved for summary disposition. It argued that there was no dispute that the parties had intended the restrictions to apply to the property and that the deed did not reflect that intent. Thus, the Partnership contended, it was entitled to a reformation of the deed to include the restrictions. The Partnership also argued that White Pine did not obtain an interest in the property until after White Pine exercised the lease option. Because White Pine had notice of the claimed restrictions by the time it exercised the lease option, the Partnership further argued that White Pine could not avoid application of the restrictions as a bona fide purchaser for value. On the basis of these arguments, the Partnership asked the trial court to grant the requested relief.

On March 16, 2007, JPMS responded to the Partnership's motion for summary disposition. JPMS argued that the omission of the restrictions was not the result of mutual mistake. JPMS supported this contention with an affidavit by the president of JPMS, Donald R. Schappacher. In the affidavit, Schappacher stated that his attorneys had expressed concerns over the restrictions contained in the purchase agreement, which, they indicated, should be resolved before closing. Schappacher further averred that JPMS's attorneys were delegated the task of reviewing the deed and, when the deed arrived with no restrictions, the attorneys approved the deed with the understanding that the deed was not subject to the restrictions. JPMS also agued that the doctrine of laches applied to the facts of the case and should preclude equitable relief. For these reasons, JPMS asked the trial court to deny the Partnership's motion and grant summary disposition in JPMS's favor under MCR 2.116(I)(2).

On May 7, 2007, the trial court issued its opinion and order. The trial court concluded that the Partnership was

entitled to reformation of the deed to include the restrictions under the undisputed facts of the case. The trial court also rejected the contentions that the merger doctrine barred reformation and that White Pine was a bona fide purchaser. Finally, the trial court concluded that the cell tower constituted a utility conduit and, therefore, violated the use restrictions. For these reasons, the trial court granted the Partnership's motion for summary disposition and denied White Pine's motion for summary disposition. On May 31, 2007, the trial court entered a judgment reforming the deed to include the restrictions, enjoining the construction of a cell tower and fence, and ordering the removal of the existing cell tower and fence.

White Pine and JPMS appealed separately. The appeals were consolidated.

II. THE EQUITABLE POWER TO REFORM A DEED

White Pine first argues that the deed at issue was not ambiguous and did not contain any restrictions. Therefore, the trial court did not have the authority to reform it to include restrictions and should have enforced the deed as written.

A. STANDARD OF REVIEW

This Court reviews de novo decisions on motions for summary disposition. *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). Whether a grant of equitable relief is proper under a given set of facts is a question of law that this Court also reviews de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

B. THE POWER TO REFORM AN UNAMBIGUOUS DEED

Michigan courts sitting in equity have long had the

power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise. See *Scott v Grow*, 301 Mich 226, 238-239; 3 NW2d 254 (1942); see also *Potter v Chamberlin*, 344 Mich 399, 407; 73 NW2d 844 (1955) (noting that the "power of a court of equity to grant relief by way of reformation of a conveyance of property, or other instrument in writing, on the ground of mutual mistake is not open to question"). And our Supreme Court has never limited the equitable power to reform an instrument to only those cases involving ambiguous deeds. Indeed, our Supreme Court has specifically held that the equitable power to reform may be applied to unambiguous agreements. See *Urick v Burge*, 350 Mich 165; 86 NW2d 543 (1957).

In *Urick*, the plaintiff sued for specific performance of an option to purchase land that the plaintiff had leased from the defendant. *Id.* at 166. The defendant presented evidence that, despite the language actually used in the lease, the parties had intended to provide the plaintiff with a first opportunity to purchase the property at the end of the 10-year lease, should the defendant wish to sell it. *Id.* at 167-168. On the basis of the parties' testimony, the trial court concluded that the parties intended the option—whether an absolute option or one subject to the defendant's decision to sell—to be exercised at the end of the 10-year lease. *Id.* at 168. For that reason, the trial court concluded that the plaintiff's suit filed before the end of the lease was premature and dismissed it. *Id.* The plaintiff then appealed to our Supreme Court.

On appeal, the plaintiff contended that the trial court erred in "making a contract for the parties contrary to the clear and definite terms of the lease," *id.* at 166, especially considering that both parties had read it, *id.* at 174. But our Supreme Court rejected the notion that the

lease had to be enforced as written on that basis: "If reading a written instrument (which both parties thereto admit did not express their intention) precludes reformation thereof on the ground of mutual mistake, then we wipe out hundreds of years of equity and elevate the scrivener to the ermine." *Id.* The Court acknowledged that a strictly formal system of law " ' "knows no contrast between the will and the utterance, and no possibility of a contradiction between the two," ' " *id.* (citations omitted), but rejected this system as "primitive":

> We do not dispute the seductive simplicities of this doctrine. At one stroke we remove from the law all the vexing and confounding questions about what goes on in the mind of man. Who cares? There stands the scroll.
>
> But it has never been doubted, from the very beginnings of what we know as equity, that the chancellor does indeed concern himself with the intent of people. Specifically, as to the situation confronting us, that he will amend an instrument to represent the actual agreement of the parties, *regardless of the content of the parchment.* [*Id.* at 174-175 (emphasis added).]

Hence, the "general rule is that courts will follow the plain language in a deed in which there is no ambiguity." *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). But if "the deeds fail to express the obvious intention of the parties, the courts will try to arrive at the intention of the parties . . . ." *Id.* Consequently, the trial court could properly reform the deed at issue—even though it was not ambiguous—if the Partnership established the necessary grounds for relief.

III. THE JELINEK AFFIDAVIT

White Pine next contends that, because Jelinek's affidavit was improperly recorded, the trial court could not properly consider it when determining whether to

grant summary disposition. However, even if we were to conclude that the affidavit was not properly recorded, see MCL 565.451a, White Pine failed to cite any authority for the proposition that a trial court may not consider an improperly recorded affidavit in deciding a motion for summary disposition. Furthermore, White Pine did not state how this error prejudiced it in the trial court. Because this issue was not properly briefed on appeal, White Pine has abandoned any claim of error in that regard. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

IV. THE MERGER DOCTRINE AND THE POWER TO REFORM A DEED

On appeal, both White Pine and JPMS argue that the prior negotiations and the purchase agreement were merged into the deed. Because the prior negotiations and agreement were merged into the deed, they further contend, the trial court erred when it reformed the deed on the basis of the prior negotiations and agreement between the parties.

A. STANDARD OF REVIEW

Whether the merger doctrine applied to preclude the trial court from considering the parties' prior negotiations and agreement is a question of law. See *Goodspeed v Nichols*, 231 Mich 308, 315-316; 204 NW 122 (1925); *Greenspan v Rehberg*, 56 Mich App 310, 320; 224 NW2d 67 (1974). This Court reviews questions of law de novo. *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002).

B. THE MERGER DOCTRINE

Under the merger doctrine, "a deed made in full execution of a contract for the sale of land is presumed

to merge the provisions of a preceding contract pursuant to which it is made, including all prior negotiations and agreements leading up to execution of the deed . . . ." *Goodspeed, supra* at 316. But this rule is not absolute. For example, Michigan courts have long recognized that, where delivery of the deed represents only partial performance of the preceding contract, the unperformed portions are not merged into it. *Id.*; see also *Chapdelaine v Sochocki*, 247 Mich App 167, 171; 635 NW2d 339 (2001). Similarly, the equitable power to reform a deed is an exception to application of the merger doctrine. As already noted, Michigan courts have long upheld the equitable power to reform a deed on the basis of a mutual mistake or a unilateral mistake coupled with inequitable conduct or fraud. See *Scott*, *supra* at 238-239. In most, if not all, cases, the actual intent of the parties to a deed can be discerned only from evidence concerning the prior negotiations and agreements of the parties along with evidence that the deed did not accurately reflect that intent. And our Supreme Court has recognized that, where the proofs warrant it, a court sitting in equity might reform a deed notwithstanding the doctrine of merger. See *Clifton v Jackson Iron Co*, 74 Mich 183; 41 NW 891 (1889), partially overruled on other grounds *Blough v Steffens*, 349 Mich 365 (1957); see also *Parsons v Detroit & M R Co*, 122 Mich 462; 81 NW 343 (1899) (noting that, absent evidence of mistake or fraud, a deed would control over a previous contract).

In *Clifton*, *supra* at 184, the defendant sold land containing standing timber to the plaintiff. The agreement to sell included a provision reserving to the defendant the right to cut the timber within 10 years of the agreement. *Id.* The defendant then conveyed the land to the plaintiff by a warranty deed that did not contain the reservation. *Id.* at 184-185. Eight years

later, the defendant entered the land and cut the timber, after which the plaintiff sued for trespass. *Id.* at 184. In considering the evidence, our Supreme Court noted that it was within the defendant's power to relinquish the reservation, and, on the basis of the evidence, held that the deed must control over the reservation contained in the agreement to sell. *Id.* at 185. However, the Court also noted: "We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected." *Id.* The Court explained that it did not need to consider the issue of mistake because there was "no testimony tending to show that the deed was not supposed and intended to close up all the rights of the parties." *Id.*

Furthermore, although no modern Michigan cases have specifically stated that the doctrine of merger does not preclude a court from examining prior negotiations and agreements when exercising its equitable power to reform a deed, in practice courts have done just that. See, e.g., *Potter*, *supra* at 407-408 (permitting reformation of a deed in part on the basis of evidence concerning prior negotiations and agreements); *Bush v Merriman*, 87 Mich 260; 49 NW 567 (1891) (examining evidence of prior negotiations to conclude that a seller could seek reformation of a deed purporting to grant more land than the parties understood would be the subject of the deal). Likewise, other states' courts have explicitly recognized the equitable power to reform a deed as an exception to the rule that prior negotiations and agreements are merged into a deed. See *Czarobski v Lata*, 227 Ill 2d 364, 371-373; 882 NE2d 536 (2008) (holding that mutual mistake is an exception to application of the merger doctrine and listing jurisdictions that have held the same); *Panos v Olsen & Assoc Constr, Inc*, 2005 Utah App 446, ¶ 14; 123 P3d 816 (2005) (stating that Utah recognizes four exceptions to appli-

cation of the merger doctrine including " 'mutual mistake in the drafting of the final documents' ") (citation omitted); *Providence Square Ass'n, Inc v Biancardi*, 507 So 2d 1366, 1371 (Fla, 1987) (stating that the doctrine of merger "is inapplicable in an action seeking the equitable remedy of reformation"). On the basis of these authorities, we conclude that the merger doctrine does not prevent a court from exercising its equitable power to reform a deed. Therefore, the trial court could properly consider the parties' prior negotiations and agreement when determining whether the deed accurately reflected the intent of the parties.

V. THE RELEVANCY OF THE PURCHASE AGREEMENT

As part of its argument on merger, White Pine also contends that the purchase agreement was not relevant to establish the intent of the parties because the agreement was not between the Partnership and JPMS. However, White Pine did not raise this argument in the trial court. Our Supreme Court recently reiterated that, in a civil case, the failure to properly raise an issue in the trial court generally constitutes a waiver of that issue on appeal. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Although White Pine waived this issue, this Court may overlook the preservation requirements "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr*, *Inc,* 269 Mich App 424, 427; 711 NW2d 421 (2006).

This issue involves sorting out the relationships between the Trust, the Partnership, and the individual members of the Trust and the Partnership, as well as

the capacities in which these entities acted. The trial court never had the opportunity to sort out these issues. Further, by failing to properly raise this issue in the trial court, White Pine denied the Partnership the opportunity to elicit testimony and present documentary evidence concerning the relationship between these parties. Finally, despite the nature of the relationships, it is clear that JPMS primarily dealt with Lanny L. Johnson, who acted as the agent for the Trust and the Partnership. Hence, by whatever relationship and capacity Johnson may have appeared, JPMS must have negotiated with the understanding that the purchase agreement applied to the transfer of the Partnership land at issue. Consequently, under these facts, we decline to further consider this issue.

VI. EVIDENCE IN SUPPORT OF MUTUAL OR UNILATERAL MISTAKE

Both White Pine and JPMS argue that there was insufficient evidence to support reformation of the deed on the basis of a mutual or unilateral mistake. For that reason, they further argue, the trial court erred when it granted summary disposition in favor of the Partnership and reformed the deed on the basis of mutual mistake or unilateral mistake.

A. STANDARD OF REVIEW

This Court reviews de novo whether a trial court properly granted summary disposition. *State Farm Fire & Cas Co*, *supra* at 482. When reviewing a motion for summary disposition, this Court examines the evidence submitted by the parties in the light most favorable to the party opposing the motion. *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005).

B. DISTINCT ENTITIES AND MERGER

As a preliminary matter, we note that White Pine in part relies on its contention that the purchase agreement was not between JPMS and the Partnership and, for that reason, cannot constitute evidence of the parties' intent. As already noted earlier, this issue was not properly raised in the trial court, and we decline to consider it. *Walters*, *supra* at 387-388. Likewise, White Pine again argues with respect to this issue that the purchase agreement should be disregarded because the closing documents contain merger clauses. However, for the same reasons we stated earlier, we reject the contention that the doctrine of merger bars application of the equitable power to reform deeds or otherwise consider prior negotiations and agreements. Therefore, we shall limit our analysis of this issue to whether the trial court properly concluded that, under the undisputed facts of the case, the Partnership was entitled to have the deed reformed to include the restrictions.

C. THE POWER TO REFORM ON THE BASIS OF MUTUAL AND UNILATERAL MISTAKES

A deed may be reformed because of the mutual mistake of the parties. *Potter*, *supra* at 407. But the party seeking reformation must prove the mutual mistake by "clear and satisfactory" evidence, "so as to establish the fact beyond cavil." *Crane v Smith*, 243 Mich 447, 450; 220 NW 750 (1928); see also *Stevenson v Aalto*, 333 Mich 582, 589; 53 NW2d 382 (1952) (stating that the burden is on the party seeking reformation and that the evidence "must be convincing and must clearly establish the right to reformation"). A mutual mistake may be one of fact or one of law. See *Schmalzriedt v Titsworth*, 305 Mich 109, 118-119; 9 NW2d 24 (1943). Further, mistakes of law are divided into two classes:

mistakes regarding the legal effect of the contract actually made and mistakes in reducing the instrument to writing. *Id.* at 119-120.

> "In the former, * * * the contract actually entered into will seldom, if ever, be relieved against unless there are other equitable legal features calling for the interposition of the court; but in the second class, where the mistake is not in the contract itself, but terms are used in or omitted from the instrument which give it a legal effect not intended by the parties, and different from the contract actually made, equity will always grant relief unless barred on some other ground, by correcting the mistake so as to produce a conformity of the instrument to the agreement." [*Id.* at 120, quoting 10 RCL at 315.]

A court may also, under certain circumstances, reform a contract on the basis of a unilateral mistake. Michigan has long recognized that an agreement may be reformed because of a unilateral mistake that was induced by fraud. See *Windham v Morris*, 370 Mich 188, 193; 121 NW2d 479 (1963). However, fraud is not a necessary element of every action to reform an agreement on the basis of a unilateral mistake. Our Supreme Court has stated:

> "[I]f one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is, the latter can have the writing reformed so that it will express that intention." [*Woolner v Layne*, 384 Mich 316, 318-319; 181 NW2d 907 (1970), quoting 2 Restatement Contracts, § 505, p 973.]

See also *Barryton State Savings Bank v Durkee*, 325 Mich 138, 140-142; 37 NW2d 892 (1949) (recognizing that a contract may be reformed because of a unilateral mistake where the other party had knowledge of the mistake and concealed that knowledge). Consequently,

although White Pine correctly notes that there was no evidence that JPMS induced the Partnership into making a mistake through fraud, the trial court could reform the deed at issue on the basis of a unilateral mistake without a showing of fraud.

D. THE EVIDENCE

In support of its contention that the deed at issue should be reformed to include the restrictions provided in the purchase agreement, the Partnership relied on the language of the purchase agreement, Schappacher's deposition, and Jelinek's affidavit. The purchase agreement, which was signed by Schappacher, clearly provides that "[t]he deed to be executed in conveyance of the subject Property shall contain" the specified building and use restrictions. Hence, by signing this agreement, the parties expressly stated that it was their mutual intent that the deed would contain these restrictions. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) ("[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law.").

Further, Schappacher's deposition testimony confirms that the restrictions were an important part of the negotiations between the parties. Schappacher testified that he participated in negotiations concerning two different parcels of property owned by the Partnership. He stated that JPMS had initially sought a different piece of property than the one eventually purchased. He explained that, after Johnson agreed to modify the building and use restrictions for that first property, Johnson raised the purchase price. Because the new price was "more expensive than what we thought worked for our project," Schappacher began to look at the possibility of purchasing the property at

issue. Schappacher admitted that he was aware of the restrictions contained in the purchase agreement for that property. But he contended that he did not intend them to apply to the property, and that there were continuing discussions even after the signing of the deal. Nevertheless, Schappacher admitted that the continued discussions only concerned approvals and sewer credits that were specifically contemplated under the purchase agreement. He also confirmed that none of these discussions involved waiving or modifying the deed restrictions.

In addition to this testimony, the Partnership submitted Jelinek's affidavit. Although Jelinek carefully avoided taking responsibility for the failure to include the restrictions on the deed, he did aver that the restrictions were "not attached" to the deed "as provided by the Purchase Agreement" and that the affidavit was being made to correct the deed to reflect the parties' actual intent. Hence, he averred that he knew that the deed should have contained the restrictions.

This evidence established the existence of a mutual mistake of law. See *Schmalzriedt*, *supra* at 120. The Partnership clearly wanted to ensure that the property it sold remained subject to the restrictions. Indeed, the Partnership refused to modify the restrictions on the first property without also raising the price, which in effect ended the first set of negotiations. The fact that Schappacher actually negotiated a change to the first set of restrictions, but only for an increased price, also shows that he was aware of the importance of the restrictions. Hence, these prior negotiations bolster the conclusion that, when Schappacher and Johnson signed the purchase agreement, they had agreed on behalf of their respective entities that the deed should contain the restrictions. And there was no evidence that, there-

after, Schappacher or anyone at JPMS made efforts to remove the restrictions from the deed. Finally, the Jelinek affidavit establishes that the deed did not contain these restrictions even though it was the intent of the parties to have them attached. Thus, this evidence indicates that both parties specifically intended the deed to contain terms that imposed building and use restrictions on the property. Because the terms were omitted from the deed, the deed did not have the legal effect intended by the parties. Hence, the Partnership was entitled to reformation of the deed on the basis of mutual mistake. *Stevenson*, *supra* at 589.

Notwithstanding this evidence, White Pine argues that the trial court could not find a mutual mistake. White Pine bases this argument on Schappacher's deposition testimony and affidavit to the effect that he did not want the restrictions to apply. However, neither of these submissions establishes that, notwithstanding that inclination, JPMS did not ultimately intend to acquiesce to the restrictions to complete the sale. Further, Schappacher's assertions in this regard are based largely on his account of continuing interactions with Johnson *after* he signed the purchase agreement. However, Schappacher admitted that these subsequent discussions did not involve the restrictions, but were instead entirely related to requirements contemplated by the purchase agreement. Hence, Schappacher's self-serving statements are belied by his own testimony, and they do not establish a question of fact regarding the mutuality of the mistake.

Schappacher's affidavit not only fails to refute the mutuality of the mistake, it actually bolsters the conclusion that Schappacher fully expected the deed to be subject to the restrictions in the purchase agreement. In his affidavit, Schappacher averred that there were a

number of matters "that needed to be resolved prior to the closing." These matters included JPMS's "concerns with the restrictions set forth in the Preliminary Sales Agreement." According to Schappacher, the attorneys wanted to "clarify some of the language before closing." This is clear evidence that Schappacher was aware of the restrictions and believed that the deed would contain the restrictions. In fact, these averments support an inference that Schappacher still expected the restrictions to apply, albeit hopefully with some clarification.

Notwithstanding this, Schappacher further averred:

> All of these considerations, concerns and contingencies [were] considered in totality just prior to closing. All matters relating to title, including the review of the title insurance and the warranty deed was delegated to legal counsel. The closing documents, including the warranty deed, were approved by legal counsel with notice and understanding that the use restrictions were not contained therein. There was no mistake or misunderstanding on the part of JPMS.

On the surface this appears to suggest that JPMS intended the deed to be free of the restrictions. However, on closer examination, it does not establish a question of fact concerning the mutuality of the mistake.

Schappacher averred that he empowered his attorneys to deal with "[a]ll matters relating to title," but at no point did he say that he told his attorneys to refuse to close the deal without first renegotiating the restrictions. In addition, Schappacher did not aver that he or his attorneys actually expressed any concern to the Partnership or otherwise initiated any discussions about the restrictions. Indeed, it is undisputed that the parties did not even attend the closing. Hence, the affidavit does not support an inference that JPMS no longer expected the deed to include the restrictions.

Likewise, Schappacher's averment that the final deed was approved "with notice and understanding" that the deed did not contain the restrictions is not the equivalent of stating that JPMS did not intend or expect the deed to contain the restrictions. Rather, taken in context of the earlier averment that his attorneys were concerned about the language of the restrictions even just before the closing, it is clear that JPMS fully expected the deed to contain the restrictions. Given the prior negotiations concerning deed restrictions that resulted in a lost opportunity to purchase the first property, JPMS must have been surprised when the title company sent a deed with no restrictions. In that sense, because the deed was not as it was expected to be under the parties' agreement, JPMS knew it was a document that had been mistakenly drafted. And the fact that the attorneys approved the deed with the full understanding that it did not contain the contemplated restrictions does not transform the omission into a unilateral mistake. Consequently, the trial court properly determined that the deed did not reflect the actual intent of either party and, accordingly, should be reformed as a mutual mistake.

Even if we were to conclude that Schappacher's affidavit created a question of fact concerning whether the mistake was mutual, the Partnership would still be entitled to relief under unilateral mistake precedents. Reformation would be warranted if JPMS knew that the Partnership intended the restrictions to be included within the deed, recognized that the deed did not accurately express that intent, and remained silent about the mistake. *Woolner*, *supra* at 318-319; *Barryton State Savings Bank*, *supra* at 141-142.

Assuming that Schappacher's affidavit supports an inference that JPMS no longer intended the deed to contain the restrictions, there is no evidence that the

Partnership had any intention of voluntarily relinquishing the restrictions negotiated in the purchase agreement. Indeed, as already noted, Schappacher's affidavit supports the conclusion that JPMS fully expected the Partnership to send a deed that contained the restrictions. Further, Schappacher averred that his attorneys recognized that the deed did not contain the contemplated restrictions and approved it on that basis. Thus, the undisputed evidence supports an inference that JPMS knew that the Partnership intended the deed to contain the restrictions, recognized that the restrictions had been omitted, and remained silent about the mistake. Therefore, even if the mistake were unilateral, the evidence submitted by the parties would still warrant reformation of the deed. *Woolner*, *supra* at 318-319; *Barryton State Savings Bank*, *supra* at 141-142.

Finally, we note that White Pine's statement of the question presented for this issue suggests that the trial court could not grant the Partnership relief on the basis of unilateral mistake or fraud because the Partnership failed to plead fraud. However, White Pine did not properly support this argument with analysis or citation of relevant authorities in its brief. Rather, White Pine confined its argument to analyzing whether the record evidence was sufficient to establish grounds for reforming the deed. Therefore, to the extent that White Pine raised this issue, it abandoned it on appeal. *Hamade*, *supra* at 173. In any event, White Pine does not argue that the trial court could not grant relief on the basis of a unilateral mistake and, as already noted, relief for a unilateral mistake may be granted even in the absence of fraud. Consequently, even if White Pine had not abandoned this argument, it would be without merit.

The trial court properly granted summary disposition with regard to the Partnership's request to reform the deed.

VII. ADMISSIONS

White Pine next argues that the trial court erred when it failed to apply the Partnership's admission that the cell tower did not constitute utility wires or conduits within the meaning of the restrictions.

A. STANDARD OF REVIEW

The interpretation and application of a court rule involves a question of law that this Court reviews de novo. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 123-124; 693 NW2d 374 (2005). However, this Court reviews the factual findings underlying a trial court's application of a court rule for clear error. MCR 2.613(C). A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Massey v Mandell*, 462 Mich 375, 379; 614 NW2d 70 (2000).

B. ANALYSIS

On October 19, 2006, White Pine allegedly served requests for admissions on the Partnership. These included requests for the Partnership to admit that the cell tower did not constitute a "utility wire" or "conduit." The Partnership purportedly failed to respond to the requests and, in its motion for summary disposition, White Pine asked the trial court to deem these requests admitted. But the Partnership responded by arguing and presenting evidence that it was never served with requests for admissions. White Pine countered with its own evidence that it had in fact served the requests on the Partnership. In its opinion and order granting summary disposition in favor of the Partnership, the trial court found that the Partnership had not been

served with the requests for admissions: "The Court is persuaded from the Affidavit of Attorney [Mark] Hullman [plaintiff's attorney] and supporting exhibits that the Requests to Admit were not received." For that reason, the trial court did not deem the requested admissions as having been made.

Under MCR 2.312(B)(1), a party served with requests for admission must answer the requests within 28 days. If the party served does not answer within the specified time, the requested admissions are deemed as having been made. *Id.* But as a threshold matter, the requests must actually be served before a party can be faulted for failing to respond. Hence, the trial court had to determine whether the Partnership actually received the requests. On the basis of a credibility assessment of the evidence submitted by the Partnership, the trial court found that the Partnership had not received the requests.

On appeal, White Pine presents the same evidence that it submitted to the trial court in support of its contention that it did in fact serve the requests. But this is insufficient to demonstrate clear error. The dispute over the admissions came down to a credibility assessment of the parties' submissions, including the Partnership's attorney's affidavit. And the trial court resolved this credibility assessment in favor of the Partnership. Although the trial court's credibility assessment was based primarily on written submissions, the trial court's familiarity with the proceedings and the parties' counsel gave it a superior insight into the validity of the competing claims. Because the evidence does not clearly favor either party, we shall defer to the trial court's superior ability to judge the credibility of the parties' attorneys. *Sparling Plastic Industries, Inc v Sparling*,

229 Mich App 704, 716; 583 NW2d 232 (1998). There was no error warranting relief.

VIII. APPLICATION OF THE RESTRICTIONS

White Pine and JPMS also argue that the trial court erred when it interpreted the restrictions to preclude the construction of a cell tower on the property at issue.[1]

A. STANDARD OF REVIEW

The interpretation of restrictive covenants is a question of law that this Court reviews de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002). In construing restrictive covenants, the overriding goal is to ascertain the intent of the parties. *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925). Where the restrictions are unambiguous, they must be enforced as written. *Hill v Rabinowitch*, 210 Mich 220, 224; 177 NW 719 (1920). However, restrictions are strictly construed against the would-be enforcer and doubts are resolved in favor of the free use of property. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997).

B. UTILITY WIRES AND CONDUITS

The first restriction at issue states, in relevant part, that "[n]o power, telephone or other utility wires or conduits shall be installed above ground on the property

[1] We note that White Pine also argues as part of this issue that the restrictions have expired. However, this argument is premised on White Pine's contention that the purchase agreement was between the Trust and JPMS, and not between the Partnership and JPMS. As already noted, because White Pine failed to properly preserve this issue, it has been waived. For this reason, we will only address whether a cell tower constitutes "other utility wires or conduits" within the meaning of the restrictions.

other than the currently existing power lines." The cell tower at issue is clearly a structure installed above ground. Hence, the only question is whether the cell tower constitutes "power, telephone or other utility wires or conduits . . . ."

On appeal, both White Pine and JPMS argue that the cell tower does not constitute "wires" or "conduits" within the meaning of the restrictions. In addition, White Pine argues that, because the cell tower is not available for use by the public, it cannot be a "utility."

A "utility" is commonly understood to be "a public service, as the providing of electricity, gas, water, a telephone system, or bus and railroad lines." *Random House Webster's College Dictionary* (1997). Because the word utility in the agreement modifies "wires or conduits," the restriction only applies to wires and conduits that relate to the provision of public services, such as electricity, gas, water, and a telephone system. It is undisputed that the cell tower is being used as part of a telephone system. Furthermore, the restriction also applies expressly to "telephone . . . wires or conduits . . . ." Because this restriction is not ambiguous, it must be enforced as written. *Hill*, *supra* at 224.

Nevertheless, it is not clear that the cell tower constitutes "wires or conduits . . . ." The Partnership submitted photos of the cell tower, which do not readily exhibit any wiring. However, a "conduit" is commonly understood to mean "a pipe, tube, or natural channel for conveying water or other fluid," "a channel through which anything is conveyed," and "a structure containing ducts for electrical conductors or cables." *Random House Webster's College Dictionary* (1997). It would seem that the cell tower must contain some cables that are necessary for the transmission of telephone signals. And, if it does have such cables within it, they would

constitute either "conduit" or "wire" within the plain and ordinary meaning of the restriction. However, there is no record evidence to establish the existence of wiring or cable within the cell tower. For that reason, we conclude that the trial court prematurely determined that the cell tower violated the restriction.

C. UNNATURAL IMPROVEMENT

On appeal, the Partnership argues that the trial court did not err when it determined that the cell tower was a utility conduit, but also argues that the cell tower is an unnatural improvement within the meaning of the restriction labeled "(k)." This restriction provides: "No statue, fence or other unnatural improvements shall be permitted on the Property without the approval of his [sic] Seller or successor." The trial court determined that the fence surrounding the cell tower was prohibited, and neither White Pine nor JPMS contends that the fence would not be barred under the restriction. However, the trial court did not determine whether the cell tower constituted an unnatural improvement.

An "improvement" in the context of real property is defined as "a change or addition by which a thing is improved," and "unnatural" is defined to be something that is "at variance with what is normal or to be expected." *Random House Webster's College Dictionary* (1997). Hence, an unnatural improvement to property would be any improvement that was at variance with what is normal or to be expected. Although this understanding could be construed broadly, the reference to "statue" and "fence" may limit the application of this restriction. See *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005). Rather than making this determination on appeal and especially in consideration of the fact that it may be

unnecessary if the trial court concludes that the cell tower is prohibited by the restriction against utility "wires or conduits," we conclude that this matter should be determined in the first instance, if necessary, by the trial court.

D. CONCLUSION

The trial court properly determined that the fence surrounding the cell tower violated the restrictions. However, although the cell tower may constitute "wires or conduits," there is insufficient record evidence to establish this fact. Further, if that fact is not established, a determination must be made whether the cell tower is an "unnatural improvement . . . ." Therefore, on these limited bases, we reverse the trial court's grant of summary disposition and remand for further proceedings.

IX. RECORDING STATUTES AND EQUITABLE DEFENSES

White Pine next argues that it should be treated as a bona fide purchaser for value without notice of the restrictions and, therefore, protected under the recording statutes. White Pine also argues that it would be inequitable to apply the restrictions to White Pine under the facts of this case.

Under Michigan's recording statutes, all subsequent owners or encumbrances take subject to recorded liens, rights, or interests. MCL 565.25(4). It is undisputed that the deed at issue did not contain any restrictions. Because the restrictions were not recorded, they would be void against a subsequent purchaser in good faith for valuable consideration. MCL 565.29. Hence, if White Pine were a purchaser in good faith for valuable consideration, it would not be subject to the restrictions.

A good faith purchaser is one who purchases without notice of a defect in the vendor's title. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). Notice can be actual or constructive. *Id.* In the present case, White Pine entered into an agreement with JPMS concerning the lease of a portion of the property at issue before it had any notice—actual or constructive—regarding the use restrictions. However, although the agreement contained all the provisions of a valid lease, it was initially only an *option* to lease. In order to exercise the option and commence the lease, White Pine had to pay JPMS $550.

A lease can constitute an interest in real property. See MCL 565.35. However, an option to lease is not such an interest. This Court has held that an option to purchase land is "a preliminary contract for the privilege of purchase and not itself a contract of purchase." *Oshtemo Twp v City of Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). Because an option is essentially an offer that requires strict compliance, it does not create an interest in land until the conditions of the offer are met. *Id.* at 37-38. Similarly, an option to lease does not transfer an interest in land until the option is exercised. Because it is undisputed that White Pine had actual notice of the Partnership's claim that the property was subject to the restrictions before it exercised its option to lease, it was not a purchaser in good faith without notice of a defect in the title. *Richards*, *supra* at 539.

Courts in Michigan will also refrain from reforming deeds where " 'the rights of third parties intervene.' " *Scott*, *supra* at 239 (citation omitted). And courts may consider the negligence of the party seeking reformation. See *McGinn v Tobey*, 62 Mich 252; 28 NW 818

(1886). However, under the facts of this case, the equities do not weigh against enforcing the restrictions against White Pine.

The Partnership's failure to ensure that the deed contained the restrictions is not the type of negligence that would ordinarily prevent reformation of a deed. See *Urick*, *supra* at 174. Further, the undisputed facts of this case demonstrate that White Pine became aware of the Partnership's claims before it had exercised its option to lease. Although White Pine likely expended funds to investigate the site, perform due diligence, and initiate the permit process, because it had not exercised the option to lease and had not begun to erect the cell tower, it clearly had the ability to limit its losses. Despite full knowledge of the issues raised by the Partnership, White Pine deliberately proceeded with its plans; it should not now be heard to complain about the result.

X. LACHES

Finally, JPMS argues that the trial court should have concluded that the doctrine of laches precluded reformation of the deed.

The doctrine of laches is a tool of equity that remedies the inconvenience resulting from a party's failure to assert a right that was practicable to assert. *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). This tool is applicable in cases "in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Id.* In its motion for summary disposition, the Partnership submitted the affidavit of its real estate agent, Lee Bussa. In the affidavit, Bussa averred that he first learned of White Pine's intention to build a cell tower

when White Pine applied for a permit to construct the tower in the spring of 2006. He also stated that it was only shortly thereafter that he learned that the deed did not contain the restrictions provided by the purchase agreement. Hence, considering these undisputed facts, the Partnership acted as soon as practicable. *Id*. Therefore, the doctrine of laches does not bar the reformation of the deed.

XI. GENERAL CONCLUSION

The trial court did not err when it exercised its equitable power to reform the deed to include the intended restrictions. Likewise, the trial court did not err when it enjoined the erection of fencing and ordered the removal of the existing fence. Those parts of the trial court's order are affirmed. However, the trial court erred when it determined that the cell tower at issue constituted "wires or conduits" without record evidence demonstrating that the cell tower housed telephone wiring or cables. Therefore, we reverse the part of the trial court's order enjoining the construction of a cell tower on the property at issue and ordering the removal of the existing cell tower. We remand for a hearing concerning whether the cell tower constitutes "wires or conduits" within the meaning of the deed restrictions. Further, whether the cell tower constitutes an "unnatural improvement" within the meaning of the restrictions should be considered on remand, if the trial court determines that the cell tower does not constitute prohibited "wires or conduits . . . ."

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

GREAT LAKES SOCIETY v GEORGETOWN CHARTER TOWNSHIP

Docket Nos. 270031, 280574, and 2805477. Submitted October 14, 2008, at Grand Rapids. Decided October 30, 2008, at 9:05 a.m. Leave to appeal sought.

Great Lakes Society, a Michigan ecclesiastical corporation, brought two actions in the Ottawa Circuit Court against Georgetown Charter Township and the township's zoning board of appeals, challenging the board's denial of a special use permit and a variance that Great Lakes sought to allow it to construct a building for worship services and supporting ministries. The board had concluded that the principal purpose of the proposed building was not for public worship and that the building, therefore, was not a church under the zoning ordinance. While Great Lakes' permit application was pending, the township had amended the zoning ordinance establishing street-frontage requirements for churches, and the board denied the variance request because it failed to meet the amended requirements. The court, Calvin L. Bosman, J., affirmed the denial of a special use permit, agreeing that the proposed building was not a church because its principal use, as determined by the activities to take place in the building, would not be for public worship. The court further concluded that the appeal of the denial of a variance was moot because Great Lakes was not eligible to apply for the variance sought if the building was not a church. The court, however, granted Great Lakes partial summary disposition on its constitutional claims and its claim under the Religious Land Use and Institutionalized Persons Act, 42 USC 2000cc *et seq*. Great Lakes and the defendants appealed by leave granted.

The Court of Appeals *held*:

1. The trial court erred by concluding that for zoning purposes the proposed building was not a church. The correct standard is whether the building is used for public worship and reasonably closely related activities or uses. It was undisputed that the building would be used for public worship. Most of the other activities to take place in the building, including meditation, a youth center, counseling, ministerial training, and a health ministry, are reasonably closely related in substance and in space to the public-worship use.

2. The amended zoning requirements applied to Great Lake's request for a variance. As a general rule, the law to be applied in a zoning decision is the law in effect at the time of the decision. A court will not apply an amendment to a zoning ordinance, however, if the amendment was enacted in bad faith. Of the churches constructed in the township before the amendment, all but three have street frontage that meets the amended requirements, and those three have street frontage that is much closer to the requirement than that of Great Lakes' property. It is clear that the intent of the zoning ordinance was always to require at least 200 feet of street frontage and that Great Lakes' application alerted the township's zoning authorities of the need for an amendment clarifying that. The amendment was not enacted as a reason to deny Great Lakes' application. The amendment governs the use of property throughout the township, not just Great Lakes' property.

3. The board based its denial of Great Lakes' request for a variance on competent, material, and substantial evidence on the record, as required by MCL 125.3606(1)(c).

4. The trial court erred by determining that implementation of the ordinance violated 42 USC 2000cc(a) by placing an improper substantial burden on Great Lakes' religious exercise. Great Lakes is able to locate a church at some other location within the township as long as the property complies with the ordinance or qualifies for a variance by more closely complying with the ordinance requirements

5. The trial court erred by determining that Great Lakes' constitutional claims were valid under the facts of this case. The street-frontage requirement and its imposition on Great Lakes was a valid exercise of a generally applicable zoning scheme and did not violate the right of Great Lakes' members to freely exercise their religion. The ordinance did not deny the right to freedom of association because the ordinance (1) is content neutral, (2) is narrowly tailored to serve a legitimate governmental objective, and (3) leaves open ample channels of alternative means of association. Great Lakes failed to show that it has been treated differently from any similarly situated church and thus has not shown an equal protection violation.

Affirmed in part, reversed in part, and remanded for entry of partial summary disposition for the defendants.

1. ZONING — CHURCHES.

A building is a church, for zoning purposes, if it is used for public worship and activities or uses that are reasonably closely related in substance and in space to the public-worship use.

2. ZONING — ORDINANCES — AMENDMENTS OF ORDINANCES.

A court should generally apply the version of a zoning ordinance that was in effect at the time of the zoning decision, but an exception exists with respect to the application of an amended ordinance if the amendment was enacted in bad faith; among the factors to consider in determining whether there was bad faith is whether the amendment was intended to provide clarification or whether the amendment was enacted for the purpose of manufacturing a reason to deny an application for a permit or variance.

McCroskey, Feldman, Cochrane & Brock, PLC (by *John M. Karafa*), and *Roman P. Storzer* for the plaintiff.

Smith Haughey Rice & Roegge (by *William L. Henn* and *Craig R. Noland*) for the defendants.

Amicus Curiae:

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *John K. Lohrstorfer*), for the Michigan Townships Association.

Before: O'CONNELL, P.J., and BANDSTRA and GLEICHER, JJ.

BANDSTRA, J. In Docket No. 270031, plaintiff Great Lakes Society (GLS) appeals by leave granted the trial court's opinion and order affirming the denial by defendant Georgetown Charter Township Zoning Board of Appeals (ZBA) of GLS's request for a special use permit and for a variance. In Docket Nos. 280574 and 280577, defendants appeal by leave granted the trial court's opinion and order granting GLS partial summary disposition on its claims under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 USC 2000cc *et seq.*, and the Michigan and United States constitutions.

We conclude that the trial court applied an incorrect legal standard in deciding that the building GLS pro-

posed to build was not a "church" under the township ordinance and that, under the correct analysis, it is a church. Nonetheless, we conclude that the ZBA properly decided not to grant a variance with respect to the proposed building location and that it did not violate the RLUIPA or any constitutional guarantees by making that decision. Accordingly, we affirm in part, reverse in part, and remand this matter for entry of an order granting defendants summary disposition on GLS's statutory and constitutional claims. We do not retain jurisdiction.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

GLS is a Michigan ecclesiastical corporation and an IRS-recognized religious organization exempt from taxation under 26 USC 501(c)(3), and describes itself as ministering to persons having varying degrees of chemical sensitivities to common environmental pollutants. GLS seeks to construct a two-story building, approximately 9,700 square feet in size, for worship services and supporting ministries, on a six-acre parcel of property owned by GLS pastor John Cheetham (Cheetham property), located in defendant Georgetown Charter Township (the Township). The Cheetham property is zoned low-density residential (LDR). Section 8.3(A) of the Georgetown Charter Township zoning ordinances permits construction of "churches" in a residential district with a special use permit (SUP).

GLS filed its initial SUP application on April 17, 2002, and its second SUP application on February 18, 2003. According to those applications and additional information about the proposed building that GLS provided to the ZBA, the building would include (1) a 2,400-square-foot sanctuary, including a reception area, coatroom, bathrooms, kitchen, and special heating/cooling and air-

filtration equipment, for a maximum of 60 people to participate in Sunday worship services;[1] (2) a 1,600-square-foot counseling ministry area, including meeting rooms, a group conference room, a waiting lounge, and bathrooms; (3) a 1,500-square-foot tape/publication ministry area, including a recording studio, tape-copying equipment, publishing equipment, a mailing room, and a computer room; (4) an 1,800-square-foot ministerial training ministry area, including classrooms, a research library, a study area, an exercise room, a kitchen, and a bathroom; (5) a 1,200-square-foot administration area, including a ministerial office, a board of elders conference room, a bathroom, and a secretary/treasurer's office; (6) a 375-square-foot health ministry area; (7) a youth center, and (8) a large garage to house a GLS transport van, snow clearing/landscape equipment, space for a visiting minister's car, and recycling bins. The main floor was also to include airlock entrances and a mechanical/electrical/filter room.

GLS explained the purpose of the supporting ministries to the ZBA. According to GLS, its counseling ministry provides spiritual counseling to church members on an individual and group basis to facilitate their spiritual growth. John Cheetham and Timothy DeYoung, ordained ministers, are GLS's spiritual counselors. No fees are charged for counseling services.[2] Rather, as with all of

[1] GLS representatives explained that the sanctuary was designed to accommodate, at most, 60 people at one time because that was the maximum number of individuals who could be present while still maintaining an environment permitting chemically sensitive members to worship together.

[2] Contrary to this assertion, the ZBA received affidavits and deposition testimony from Harold and Anna Mae DeYoung, the parents of GLS pastor Timothy DeYoung, indicating that they were "charged" a rate of $40 an hour and a total of more than $200 for two counseling sessions

GLS's supporting ministries, donations are accepted; this is consistent with the religious belief that such giving is to be done voluntarily and "cheerfully."[3] GLS's ministerial training ministry is necessary to achieve "perpetual existence of [GLS] as a religious organization" and is an integral part of continuing GLS's form of worship and mission. A youth center was included in the proposed building in anticipation of future growth in membership and as a means to strengthen youth connection to the group and to God. The youth center would also be used for weddings, funerals, Bible forums, and other religious or worship functions. GLS's tape/publication ministry "supports members' ability to worship through personal study of Christ's teachings" and is an effective means of "evangelistic outreach for new members."

GLS described its "health ministry," termed a food cooperative or nutritional service by the Township, as a "very minor portion of [the] entire ministry," arising out of GLS's mission, which includes "teach[ing] and practic[ing] the health and nutritional principles as revealed in the Holy Scriptures and . . . provid[ing] for the members . . . as Christ taught to provide." The health ministry provides GLS members with access to

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with Cheetham. This money, which GLS characterized as a "donation," was returned to the DeYoungs because, according to GLS, the DeYoungs did not consider it to be a gift.

[3] GLS does not have any system of tithing or pledge contributions; its sole means of financial support comes from member donations. According to Cheetham:

> GLS has a strict policy of only accepting free-will donations for any of its spiritual ministries. Therefore any and all donations given to GLS in the past and in the future are understood and received for the spiritual purposes defined in [GLS's] Mission Statement. The defining principle is "For God loves a cheerful giver."

specialty food items and fragrance-free products. It also allows members to obtain "ordinary" items in a fragrance-free environment.[4] Cheetham characterized the health ministry as "a spiritual service that is essential to the well-being of the members." Members cannot participate in the health ministry until they "establish a spiritual connection" by "show[ing] their commitment through interest . . . in the spiritual teachings of [GLS]." Cheetham explained:

> [GLS's] nutritional practice is an integrated and critical part of [its] worship in much the same way that Jews would follow Kosher standards. Chemically sensitive and allergenic people find that [the GLS] Health Ministry is essential to their spiritual and physical health as well as their ability to worship and hold supporting jobs for their personal survival.

Cheetham further explained that GLS members were not required to pay for items they obtained from this ministry, but were free to make a donation to GLS in appreciation for this service.[5] Cheetham acknowledged that GLS had a one-line advertisement in the phone book under the heading of "nutritionists," using the name "Nutritional Research" at the Cheetham property address. According to Cheetham, this was GLS's most effective form of outreach to the public; when people called to express an interest in nutrition, it gave

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[4] Currently, GLS's health ministry operates out of the existing house on the Cheetham property; approximately 12 members and one or two supporters of GLS obtain products from the health ministry. Food deliveries for GLS members began in 1984. UPS deliveries occurred two to three times a week and, until April 2002, a semi-truck made additional deliveries once a month.

[5] Cheetham noted that some members included their "regular spiritual donation" with their health ministry donation and, therefore, he thought there was too much emphasis placed on the amount of the health ministry donations in the ZBA proceeding.

GLS an opportunity to relate nutritional questions to spirituality. Cheetham believed that "[a]t least 80 percent" of GLS's current members came to the group through the nutrition route; the others were referrals.[6]

GLS presented the ZBA with documentary evidence establishing that other area churches also housed ancillary services, including youth centers, preschools, day-care centers, multipurpose rooms, gymnasiums, a coffee bar, a dance studio, a book store, a printing office, libraries, offices, and kitchens, and that many of them had large garages. GLS also presented documentary evidence indicating that a number of area churches offered counseling services, ministerial training, and other ministerial services, such as performing weddings or funerals, for a fee. Finally, GLS provided documents showing that several churches had sanctuaries that comprise less than 30 percent of the church building.

Following a remand from the trial court to allow the parties to further develop the record, the ZBA concluded that the principal purpose of GLS's proposed building was not for public worship and, therefore, that the proposed building is not a church for purposes of the zoning ordinance.[7] Consequently, GLS's SUP application was denied.

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[6] GLS is registered with the state of Michigan as a nonprofit food cooperative. Cheetham explained that GLS was instructed by state officials to use the term "co-op" because that was the only way to achieve exemption from having to obtain a license as a food establishment for the health ministry.

[7] Because the term "church" is not defined in the Township's zoning ordinance, which instructs that undefined terms "shall have the meanings customarily accepted," the ZBA consulted the *Oxford American Dictionary*, which defines a church as "a building for public worship."

On February 24, 2003, while GLS's SUP application was pending with the Township, the township board approved an amendment of § 20.4(E) of the zoning ordinance relating to street-frontage requirements for churches constructed in residential districts. Before this amendment, GLS believed that the Cheetham property met, or would be able to meet, the requirements of § 20.4(E). However, the Cheetham property did not meet the amended requirements. Consequently, GLS applied for a variance from the frontage requirements in § 20.4(E) as amended. The ZBA denied GLS's variance request, concluding that it failed to meet the specific standards for granting a variance set forth in the zoning ordinance.[8]

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[8] Section 28.11(C) of the ordinance provides:

> Variances. The [ZBA] shall have the power to authorize, upon an appeal, specific variances from the requirements of this Ordinance, when the applicant demonstrates that ALL of the following conditions will be satisfied.
>
> (1) Granting the variance be [sic] in the public interest and will ensure that the spirit of this Ordinance shall be observed.
>
> (2) Granting the variance shall not permit the establishment within a district of any use which is prohibited, nor shall any use variances be granted.
>
> (3) That there are practical difficulties in complying with the standards of the Zoning Ordinance resulting from exceptional, extraordinary, or unique circumstances or conditions applying to the property in question, that do not generally apply to other property or uses in the vicinity in the same zoning district; and have not resulted from the adoption of this Ordinance.
>
> (4) That the granting of such variance will not be of substantial detriment to adjacent properties or improvements in the vicinity; or, that the application of conditions to an approved variance will eliminate or sufficiently mitigate potential detrimental impacts.

In reaching this decision, the ZBA noted the purposes of the requirement from which a variance was sought, as well as the degree of the variance sought. More specifically, the Township planner observed, with the ZBA's concurrence, that the purpose of requiring that a church constructed in a residential zone have 200 feet of frontage on a major street is to ensure adequate sight distance for traffic entering and leaving the church site, to provide sufficient spacing between the access point to the church and adjacent property lines and driveways, to minimize confusion with regard to multiple driveways within a limited distance, to provide reasonable vehicle "stacking space" in front of the church property, and to minimize conflict with adjacent driveways with vehicles turning left into the site. Additionally, the ZBA observed that the Cheetham property has only 66 feet of frontage on a major street and, therefore, that the variance sought from the 200-foot requirement was "huge." The ZBA took note that all but three of the 37 churches in the Township have 200 feet of frontage on a major street, as required by § 20.4(E)(2). Of the three noncompliant churches, the first was constructed more than 50 years ago and has 165 feet of frontage on a major street, the second was constructed more than 20 years ago and has 153 feet of frontage on a major street, and the third, constructed in 1990, was granted a variance to have less road frontage on a major

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(5) That granting such variance is necessary for the preservation of a substantial property right possessed by other properties in the vicinity in the same zoning district.

(6) That granting such variance will not cause any existing non-conforming use, structure, or condition to be increased or perpetuated, contrary to the provisions of Chapter 27 of this Ordinance, expect in accordance with Section 27.12.

(7) That the variance is not necessitated as a result of any action or inaction of the applicant.

street; it has 132 feet of frontage on two separate major streets.[9] On the basis of these considerations, the ZBA denied the variance request.

GLS appealed the ZBA's denial of both the SUP and the variance in the Ottawa Circuit Court, by way of two separate complaints, each of which also asserted claims under RLUIPA and the Michigan and United States constitutions, as well as for superintending control. The trial court first concluded that, under Michigan law, whether a building is a "church" is properly ascertained by evaluating the "principal use" of the building as determined by the activities that take place in the building. After observing that "[t]here is record evidence that supports the ZBA's conclusion that the principal use of the proposed building would not be for public worship," the trial court concluded that the decision of the ZBA that the proposed building was not a church for zoning purposes was supported by competent, material, and substantial evidence on the record. The trial court further concluded that GLS's appeal of the ZBA's denial of a variance was moot because, the proposed building not being a church, GLS was not eligible to apply for the variance sought.

Later, in response to cross-motions for summary disposition of GLS's RLUIPA and constitutional claims, the trial court determined that GLS's construction of the proposed structure would constitute "religious exercise" under RLUIPA. Consequently, the trial court concluded that the determination that the proposed building was not a church and the denial of a variance

[9] Because of the relatively small degree of variance sought in that case, and because that church had frontage on two separate major streets, so as to divide the effect of any traffic concerns, that case was not considered to be of precedential value by the ZBA in deciding whether to grant GLS's request for a variance in the instant case.

amounted to a "substantial burden on religious exercise," were capricious and not in furtherance of a compelling governmental interest, and, therefore, contravened the "substantial burden" provision of RLUIPA, 42 USC 2000cc(a). The trial court further determined that the GLS members' constitutional right to the free exercise of religion was "coextensive with GLS's rights under RLUIPA" and, thus, that the ZBA's actions violated that right as well. Further, the trial court concluded that the ZBA's actions violated GLS's members' constitutional rights to freely associate and to equal protection.[10]

II. ANALYSIS

A. IS THE PROPOSED BUILDING A CHURCH?

GLS first argues that the trial court erred in affirming the ZBA's determination that its proposed building does not constitute a church for zoning purposes. We agree.

Ordinances are treated as statutes for the purposes of interpretation and review. *Soupal v Shady View, Inc,* 469 Mich 458, 462; 672 NW2d 171 (2003). Hence, the interpretation and application of a municipal ordinance presents a question of law, which this Court reviews de novo. *City of Riverview v Sibley Limestone,* 270 Mich App 627, 630; 716 NW2d 615 (2006). The goal of

[10] The trial court concluded, however, that the ZBA's actions did not violate the "equal terms," "nondiscrimination," or "total exclusion/unreasonable limitation" provisions of RLUIPA, 42 USC 2000cc(b), and did not infringe GLS members' constitutional rights to due process, freedom of assembly, or free speech and further that GLS "failed to state a claim on which relief can be granted in superintending control." GLS has not cross-appealed the trial court's grant of partial summary disposition to defendants on the counts of its complaints presenting these claims.

statutory construction, and thus of construction and interpretation of an ordinance, is to discern and give effect to the intent of the legislative body. *Neal v Wilkes,* 470 Mich 661, 665; 685 NW2d 648 (2004). Terms used in an ordinance must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. See *Halloran v Bhan,* 470 Mich 572, 578; 683 NW2d 129 (2004).

Generally, courts review a decision of a zoning board to determine whether it complies with the constitution and the laws of the state, is based on proper procedure, is supported by competent, material, and substantial evidence on the record, and represents the reasonable exercise of the board's discretion. MCL 125.3606. The determination of " 'the facts which, taken together, can be said to describe the situation' " presented by GLS's practices and building proposal is a factual matter, and the ZBA decisions in that regard are entitled to deference. *Macenas v Village of Michiana*, 433 Mich 380, 395-396; 446 NW2d 102 (1989) (citation omitted). However, the manner in which the zoning ordinance applies to those facts, i.e., whether the proposed building is a church for purposes of the ordinance, is a question of law, for this Court to decide as a matter of review de novo. *Id.* at 396.

For the reasons discussed below, the circuit court erred in concluding that Michigan law requires that a proposed building constitutes a church only if its principal use is public worship. Consequently, the circuit court erred in concluding that GLS's proposed building does not constitute a church. Rather, the correct standard is whether the building is used for public worship and reasonably closely related activities or uses. The record evidence is undisputed that the proposed building was to be used for regular public worship. Further,

the other identified uses are reasonably closely related, in substance and in space, to that public worship use. Therefore, the proposed GLS building constitutes a church for purposes of the zoning ordinance.

The trial court relied on *Portage Twp v Full Salvation Union*, 318 Mich 693; 29 NW2d 297 (1947), in analyzing whether the proposed GLS building is a "church" within the meaning of that term in the Township zoning ordinance. *Portage*, like the present case, involved a zoning ordinance that allowed a church to be located in residential zoning districts. *Id.* at 696-697. At issue were "camp meetings" that were held during the summers and the construction of small buildings to accommodate some campers and to provide meals on a no-profit/at-cost basis. *Id*. at 698. The plaintiff township brought suit, seeking an injunction to prevent those uses of the defendant's property. The Supreme Court quoted the dictionary definition of "church," which was a " 'building set apart for public worship . . . .' " *Id*. at 700. It then determined that religious gatherings at which some people would " 'camp,' in the ordinary meaning of that word," using the small buildings for residential purposes, did not constitute a church activity. *Id*. The logic of *Portage* was that, because those buildings were not "set apart for public worship" in any way, but were instead residential in nature, they did not fall within the usual definition of a "church."

The issue in *Portage* was significantly different from the issue here. The issue here is whether a proposed building that *is* to be used for public worship loses its status as a church because it also is to be used for other purposes. The trial court here erred in concluding that *Portage* addressed that question in any fashion. The trial court further erred in concluding that *Portage*

stands for the proposition that a building is a church only if its *principal* use is public worship. The trial court, citing *Portage*, reasoned that "[u]nder Michigan law, a 'church' is a building set apart whose principal use is for public worship. . . . The question, then, is what is to be the 'principal use' of GLS's proposed building." However, the term "principal use" is not found anywhere within *Portage*. And further, the dictionary definition quoted by *Portage* required only that a building be "set apart for public worship" to be considered a church. *Portage*, 318 Mich at 700. There was no suggestion whether the public worship function of the building must be its principal or predominant use, a significant or substantial use, or simply one of its uses in order to qualify as a church.

As with the ordinance in *Portage*, the ordinance at issue here does not define a "church." Therefore, as in *Portage*, this Court will turn to current dictionary definitions of "church" to find the ordinary meaning of that term as it is used in the ordinance. *Stanton v Battle Creek*, 466 Mich 611, 617; 647 NW2d 508 (2002) ("When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate."). It does not appear that the dictionary definition of "church" has changed much in the 60 years since *Portage* was decided; it is today simply defined as "a building for public . . . worship." *American Heritage Dictionary, Second College Edition*; accord *Random House Webster's College Dictionary* (2000); *Merriam-Webster's Collegiate Dictionary, Eleventh Edition*. The dictionary definition makes no suggestion about how exclusive or substantial the public worship use of a building must be for it to qualify as a church. If anything, comparing this "building for" definition to the "building set apart for" definition referred to in

Portage suggests that less exclusivity or substantiality is needed under the current usage of the term "church."

In any event, it is clear that a building must be used to some extent for public worship to fall within the definition of "church." The record here is unrefuted that regular worship services would be conducted for the GLS membership in the proposed building, and the ZBA has acknowledged that worship would take place there.[11] The argument at issue is whether, notwithstanding that use, the proposed building is not a church because of the nonworship activities and uses that will occur within it. There being no Michigan precedent addressing that question in the zoning context,[12] we turn to a brief review of such precedents from other jurisdictions. *People v Rogers*, 438 Mich 602, 609; 475 NW2d 717 (1991).

As a general matter " '[c]hurches . . . and other institutions dedicated to religious objectives are in some degree protected from the full impact of zoning restrictions. These uses are favored for reasons ranging from their unique contribution to the public welfare to constitutional guarantees of freedom of worship.' " *Rapid City v Kahler*, 334 NW2d 510, 512 (SD, 1983) (deletion added), quoting 2 Anderson, American Law of Zoning (2nd ed), § 12.18. Thus, for example, it is an "almost

[11] The ZBA argued that worship would not be open to the general public, but would be limited to a relatively closed group. However, Pastor Cheetham's testimony that anyone who is interested may attend GLS services and that the proposed building is designed to facilitate future growth is unrefuted. A conclusion that the worship expected to occur at the building would not be public is not supported by the requisite evidence. MCL 125.3606(1)(c).

[12] But see *Roman Catholic Archbishop of Detroit v Orchard Lake*, 333 Mich 389; 53 NW2d 308 (1952), discussed below. As defendants observe, precedents defining a "church activity" for tax cases are inapposite because they rest on policy concerns not at issue in zoning cases.

universal rule that churches and their attendant uses are permitted in residential areas . . . ." *Church of Jesus Christ of Latter Day Saints v Idaho Falls*, 92 Idaho 571, 574; 448 P2d 185 (1968); accord *In re Diocese of Rochester v Brighton Twp Planning Bd*, 1 NY2d 508, 522; 154 NYS2d 849; 136 NE2d 827 (1956) ("It is well established in this country that a zoning ordinance may not wholly exclude a church or synagogue from any residential district.") (emphasis deleted). As one court has reasoned, churches need not be established only in sparsely settled areas; instead, "wherever the souls of men are found, there the house of God belongs." *O'Brien v Chicago*, 347 Ill App 45, 51; 105 NE2d 917 (1952). Consistent with these principles, the Michigan Supreme Court noted that as early as 1787, in the Northwest Ordinance for the Northwest Territory, part of which became the state of Michigan, religion and morality were declared to be " 'necessary to good government and the happiness of mankind.' " *Roman Catholic Archbishop of Detroit v Orchard Lake*, 333 Mich 389, 394; 53 NW2d 308 (1952). Accordingly, the Court concluded that churches could not be completely excluded from a municipality. *Id*.

As a corollary to the favored status of churches, courts have held that zoning authorities must be flexible and accommodating in reviewing requests to permit church building projects. "It is well settled that . . . greater flexibility is required in evaluating an application for a religious use than an application for another use and every effort to accommodate the religious use must be made." *In re Genesis Assembly of God v Davies*, 208 AD2d 627, 628; 617 NYS2d 202 (1994) (citations omitted).

One component of this accommodating and flexible approach is to broadly define what constitutes a

"church" activity or use in light of changing ecclesiastical purposes and circumstances. " '[T]he concept of what constitutes a church has changed from a place of worship alone, used once or twice a week, to a church used during the entire week, nights as well as days, for various parochial and community functions.' " *Beit Havurah v Norfolk Zoning Bd of Appeals*, 177 Conn 440, 447-448; 418 A2d 82 (1979), quoting 2 Rathkopf, Zoning & Planning, § 20.03, p 20-53 (1978). More than half a century ago, the New York Court of Appeals handed down an often-cited summary of what constitutes a church in contemporary society:

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. Churches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church is strengthened . . . . When a member of the congregation cements friendships with other members of the congregation, the church benefits and becomes stronger. It is a religious activity for the church to provide a place for these social groups to meet, since the church by doing so is developing into a stronger and closer knit religious unit. To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation. [*In re Community Synagogue v Bates*, 1 NY2d 445, 453; 154 NYS2d 15; 136 NE2d 488 (1956).]

There are, however, limitations to this approach: "the religious aim of strengthening the congregation through fellowship may not be permitted to be perverted into a justification for establishing a place of entertainment, such as a country club . . . ." *Id*. "The activity or use must be intended to promote the pur-

poses for which the church is instituted, the most, but not sole, prominent purpose of which is the public worship of God." *Solid Rock Ministries Int'l v Monroe Zoning Bd of Appeals*, 138 Ohio App 3d 46, 55; 740 NE2d 320 (2000).[13] A relationship test is generally used in this regard: "the activities or the use to which the property is put must be reasonably closely related, in substance and in space, to the church's purpose." *Id.*; accord, e.g., *Idaho Falls*, 92 Idaho at 574.

While we recognize that these foreign precedents are not binding on this Court, they are nonetheless persuasive authority. *Rogers*, 438 Mich at 609. They represent a broad agreement of opinion from our sister states and are consistent with cited zoning treatises and other authorities. Further, they flow from and are consistent with the deference for religious and church activities and uses in the zoning context recognized by our Supreme Court in *Orchard Lake*. Accordingly, we adopt these principles as a matter of Michigan law and apply them in determining this appeal.[14]

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[13] The *Solid Rock* court explained more fully:

> [A] church is more than a mere building used solely for worship. Religious use has been defined to mean conduct with a religious purpose. In turn, any building used primarily for purposes connected with the faith of the congregation or to propagate such faith has been deemed used for church purposes. We agree that a church cannot enjoy completely unfettered use of its property just because the activities conducted on the property bear some relation to a church purpose. To fit within the definition of a church or church use, the activities or the use to which the property is put must be reasonably closely related, in substance and in space, to the church's purpose. [*Solid Rock*, 138 Ohio App 3d at 55.]

[14] We find the precedents relied on by defendants, *North Pacific Union Conference Ass'n of the Seventh Day Adventists v Clark Co*, 118 Wash App 22; 74 P3d 140 (2003), and *Hayes v Fowler*, 123 NC App 400; 473 SE2d 442 (1996), factually distinguishable from the instant matter. In *North*

To begin, as explained earlier, there is no doubt that the proposed building would be used for public worship. The question then becomes whether the other uses of the building are reasonably closely related, in substance and in space, to that public worship use.

All the proposed activities would occur within the same building. Accordingly, the spatial relationship test is not at issue. With respect to whether the other activities are reasonably closely related in substance to the public worship function of the proposed building, almost all of them clearly are. That is certainly true for the meditation and prayer rooms that adjoin the worship center. They provide space for traditional worship activities in a more intimate, small group setting. As explained in *Bates*, the youth center and other areas of the building designed to strengthen the fellowship of the GLS congregation serve to enrich GLS as a worshipping community. For much the same reason, the use of the proposed building to provide ministerial, faith-based counseling to congregants is reasonably closely related to the public worship use of the building.[15] See, e.g., *Church of the Saviour v Tredyffrin Twp Zoning Hearing Bd*, 130 Pa Cmwlth 542, 548; 568 A2d 1336 (1989) ("[C]ounseling is an integral part of the church's activities."). And so is use of the building to train ministers and to promulgate the teachings of the church through broadcasts and publication; these ac-

Pacific Union, the building at issue was a 40,000-square-foot five-state regional headquarters office complex that contained a relatively small worship room to be used only by building employees. In *Hayes*, the building at issue was not to be used for worship at all; it was located one-half block away from the church and its sanctuary.

[15] It is irrelevant whether counseling services are provided free or at reduced cost. Further, the record evidence, while slightly contradictory, heavily favors a conclusion that the services are provided on a donation basis.

tivities are designed and intended to effectively communicate to a wider audience the message that is regularly espoused at GLS's public worship services. See *Burlington Assembly of God v Florence Twp Zoning Bd of Adjustment*, 238 NJ Super 634, 642; 570 A2d 495 (1989) (concluding that the operation of a church's radio station is a religious activity). As the record in this case demonstrates, all these activities and uses are relatively commonplace among churches in the area and elsewhere.

The same is not true of GLS's health ministry "co-op" activities, whereby GLS buys bulk amounts of various products for distribution to its members. However, this does not necessarily mean that the health ministry is unrelated to GLS's public worship purpose. To the contrary, this activity flows directly from the unique reason for GLS's existence as a church in the first place, i.e., to accommodate the chemical sensitivities and allergies of its members. By operating its health ministry, GLS asserts that it provides a much-needed service to its members in a fashion otherwise unavailable in today's society. Pastor Cheetham characterized the health ministry as a "spiritual service that is essential to the well-being of the members" and part of the GLS mission to "teach and practice the health and nutritional principles as revealed in the Holy Scriptures . . . ." Compare *Shim v Washington Twp Planning Bd*, 298 NJ Super 395, 408; 689 A2d 804 (1997) (day-care centers considered part of a spiritual mission because they provided a valuable community service, even though they did not necessarily advance religious teachings). We cannot conclude that the health ministry does not strengthen GLS as a community in its worship and otherwise. See *Bates*, 1 NY2d at 453. Further, the health ministry generates a net positive flow of revenue that helps to support GLS in its public worship and

other endeavors. In this regard, it is similar to quasi-commercial ventures that the record demonstrates are occurring in other area churches to raise money for various causes. Thus, the health ministry use of the proposed building is not so far afield from its public worship purpose, nor so extensive,[16] that it would undermine its status as a church.

In sum, we conclude that, under the correct legal analysis, the record here does not support the ZBA's determination that the proposed GLS building is not a church for purposes of the Township's ordinance. Accordingly, as a church, GLS could qualify for an SUP to construct its building, assuming that a variance should have been granted for the location GLS proposed.

B. DENIAL OF THE VARIANCE

GLS next argues that the ZBA improperly denied its request for a variance allowing it to construct its church on the Cheetham property. The trial court did not review this decision, reasoning that, because the GLS building is not a church, it could not qualify for the variance sought. Nonetheless, because this issue was fully briefed in the trial court, this Court's review of any trial court decision on GLS's appeal of the denial would be de novo, *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004), and since the record is adequate for our review, we will consider this issue,

[16] We note that, after concluding that the buildings used for the camp meetings at issue in *Portage* were not a "church" under the dictionary definition of that term, as discussed earlier, our Supreme Court noted that those meetings were very noisy from early morning until extremely late at night and thus caused disturbance to neighbors. *Portage*, 318 Mich at 700. In contrast, the record here shows that the health ministry would involve nothing more than occasional deliveries by truck and customer activities during daytime hours.

Peterman v Dep't of Natural Resources, 446 Mich 177, 183; 521 NW2d 499 (1994).

GLS's first argument arises from the fact that the ordinance was amended during the time between its initial application and when the Township made its decision to deny that application. Before the amendment, the zoning ordinance included only a general 200-foot minimum width requirement; the amendment specified that the 200-foot length must be on an adjoining street for access.[17] GLS argues that it could have satisfied the general 200-foot minimum width require-

[17] At the time GLS filed each of its SUP applications, Georgetown Charter Township Zoning Ordinance, § 20.4(E) imposed the following site requirements for the construction of churches in residential districts:

> (1) Minimum lot width shall be two hundred (200) feet.
>
> (2) Minimum lot area shall be two (2) acres; plus an additional fifteen thousand (15,000) square feet for each one hundred (100) seating capacity or fraction thereof in excess of one hundred (100).
>
> (3) The property location shall be such that at least one (1) property line abuts and has access to a collector, major arterial, or minor arterial streets.

As amended, § 20.4(E) imposes the following site requirements for churches constructed in residential districts:

> (1) Minimum lot area shall be two (2) acres; plus an additional fifteen thousand (15,000) square feet for each one hundred (100) seating capacity or fraction thereof in excess of one hundred (100).
>
> (2) The property location shall be such that at least one (1) property line with a minimum lot width of two hundred (200) feet abuts and has access to a collector, major arterial, or minor arterial street.

The Township began the process of amending § 20.4(E) on January 13, 2003, in order "to clarify" the ordinance requirements to clearly comport with the longstanding intention of the Township that churches constructed in residential districts have a minimum of 200 feet of frontage on a major street. Township representatives explained that the filing of

ment and that it should not be subject to the amended version of the ordinance. We disagree.

As this Court explained in *Landon Holdings, Inc v Grattan Twp,* 257 Mich App 154, 161; 667 NW2d 93 (2003):

> In determining which version of a zoning ordinance a court should apply, " 'the general rule is that the law to be applied is that which was in effect at the time of decision.' " *MacDonald Advertising Co v MacIntyre,* sub nom *MacDonald Advertising Co v City of Pontiac,* 211 Mich App 406, 410; 536 NW2d 249 (1995), quoting *Klyman v City of Troy,* 40 Mich App 273, 277; 198 NW2d 822 (1972); *Lockwood v Southfield,* 93 Mich App 206, 211; 286 NW2d 87 (1979).
>
> There are two exceptions to the general rule: (1) "A court will not apply an amendment to a zoning ordinance where . . . the amendment would destroy a vested property interest acquired before its enactment . . ."; and (2) a court will not apply the amendment where "the amendment was enacted in bad faith and with unjustified delay." *Lockwood, supra* at 211, citing *City of Lansing v Dawley,* 247 Mich 394, 396; 225 NW 500 (1929), and *Keating* [*Int'l Corp v Orion Twp,* 395 Mich 539, 549; 236 NW2d 409 (1975)]. . . . "[T]he test to determine bad faith is whether the amendment was enacted for the purpose of manufacturing a defense to plaintiff's suit." *Id.*

In *Klyman,* 40 Mich App at 279, this Court identified several factors to be considered when exercising discretion to admit or deny evidence of an amended ordinance: (a) whether the plaintiff had an unquestionable right to issuance of a permit before the amendment, (b) whether the municipality had not forbidden the type of construction the plaintiff proposed before the amendment, (c) whether the ordinance was amended for the

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GLS's first application for an SUP presented the first occasion for the Township to observe that there may have been an ambiguity in this section as originally enacted.

purpose of manufacturing a defense to the plaintiff's suit, and (d) whether the city waited until the last possible minute to assert the defense. Similarly, in *Lockwood,* 93 Mich App at 211, this Court reiterated the general rule that the law to be applied is that in effect at the time of the zoning decision, subject to the exception that a court will not apply an amendment of a zoning ordinance if the amendment was "enacted for the purpose of manufacturing a defense to plaintiffs' suit." The Court noted that, in the case before it, there was evidence indicating that the amendment was intended to clarify an ambiguous ordinance and that the amendment did not apply only to the plaintiffs' property, but applied to all like structures throughout the city. Thus, this Court concluded that the trial court did not abuse its discretion in holding that the amendment was not enacted in bad faith. *Id.* at 212.

While these cases address amendment of a zoning ordinance during the pendency of litigation, and the instant ordinance was amended before the onset of litigation, they instruct that the bad faith exception does not apply to the township's February 2003 amendment of § 20.4(E) under the facts presented. The record shows that all but three of the 37 churches within the Township, each located there before the ordinance was amended, either comply with the 200-foot street frontage requirement or were granted a variance from that requirement. The three exceptions were constructed decades ago, and two have more than 150 feet of street frontage. That lends great credibility to other record evidence indicating that the intent of the ordinance was always to require 200 feet of street frontage, that the GLS application alerted zoning authorities within the Township to the need for a clarifying amendment, and that the amendment was merely intended to provide that clarification, not to concoct a reason to deny GLS's

application. See *McDonald Advertising Co v McIntyre*, 211 Mich App 406, 411; 536 NW2d 249 (1995) ("After reviewing the facts in this case, it is clear that the amendment was not enacted for the purpose of manufacturing a defense to plaintiff's suit."). Further, the amendment does not apply only to GLS; it governs the use of property throughout the Township. *Id*.; accord *Landon Holdings,* 257 Mich App at 162; *Lockwood,* 93 Mich App at 212; *Klyman,* 40 Mich App at 279. Accordingly, the zoning authorities properly applied the ordinance as requiring a variance from the 200-foot street frontage requirement.

Having determined that the amended requirements of § 20.4(E) apply here, this Court reviews the ZBA's decision to deny GLS a variance from those requirements to determine whether it is supported by competent, material, and substantial evidence on the record. MCL 125.3606(1)(c); *Norman,* 263 Mich App at 202. As noted, the 200-foot frontage requirement has been imposed on churches in the Township almost universally. The record further shows that the only variance granted was for a church having much longer frontage than the 66 feet available to the GLS parcel here.[18] The Township's planning consultant testified regarding the rationale for the 200-foot minimum requirement:

> The purpose of the requirement is to insure adequate sight distance for traffic entering and exiting the site, to provide sufficient spacing between access points and adjacent property lines and driveways, to minimize confusion with regard to multiple driveways within a limited distance, to provide reasonable vehicle stacking space in front

[18] As discussed previously, that church also had frontage on two arterial roads, thus distributing the traffic in a manner so as to, perhaps, reduce the traffic concerns that might otherwise have arisen from that site having less than the required frontage.

> of the church property, to minimize conflicts with adjacent driveways with vehicles turning left into the site.

The planner reasoned that, while these issues might certainly arise even with the limited membership of the GLS congregation today, they could be exacerbated if GLS grows, as hoped and expected, or if another church takes over the property in the future.

In sum, the decision not to grant GLS a variance was based on the large deviation requested, the purposes of the 200-foot requirement, and the traffic and public safety issues that could result from allowing GLS to establish a church on this parcel of property. As the planner further testified, the denial was justified by ordinance provisions specifying the criteria on which variance requests are to be considered. We conclude that the decision was based on competent, material, and substantial evidence and affirm that decision.

C. GLS's RLUIPA CLAIM

The "substantial burden" provision of RLUIPA provides in relevant part that

> [n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest. [42 USC § 2000cc(a)(1).]

Although the trial court determined that the Township had correctly concluded that the proposed GLS building was not a church, it nonetheless also held that

the Township had violated the RLUIPA in applying its ordinance to prevent the location of the proposed building at the location where GLS wanted to build it.[19] Specifically, the trial court determined that implementation of the ordinance placed an improper "substantial burden" on GLS's right to exercise its religion. 42 USC 2000cc(a).[20]

After the trial court issued its decision in this regard, our Court decided *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp (On Remand)*, 280 Mich App 449; 761 NW2d 230 (2008). That case is dispositive of the issue presented.[21] In *Shepherd Montessori,* this Court reasoned:

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[19] To the extent that this determination was based on the Township's failure to consider the proposed building a church, questions regarding that decision have become moot because of our conclusion that it is a church. The same is the case for the constitutional claims discussed below. Thus, we consider the statutory question and the constitutional claims only with regard to the denial of the variance.

[20] To the extent that GLS argues that the RLUIPA was also violated because the Township's implementation of its ordinance "treat[ed] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," 42 USC 2000cc(b)(1), we consider that argument to be improperly preserved for appeal and improperly argued because it was presented without citation of any authority other than mere references to the RLUIPA. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim or to search for authority to sustain or reject that party's position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *In re Toler,* 193 Mich App 474, 477; 484 NW2d 672 (1992). Further, the gist of the argument is that the Township's zoning scheme treats churches less favorably than some commercial enterprises, but, as a matter of fact, that is not the case. Most of the commercial enterprises about which GLS complains are completely prohibited from locating in residential zoning districts. The imposition of certain conditions, like the 200-foot street frontage requirement, on churches that want to locate in residential districts certainly does not treat them less favorably in comparison with others that are simply excluded altogether.

[21] Although *Shepherd Montessori* involved a religious school rather than a church, we see no logical distinction between those uses of property for purposes of the RLUIPA and its "substantial burden" provision.

> [T]o establish a RLUIPA violation, plaintiff must show that the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires. Plaintiff did not allege that the property at issue has religious significance or that plaintiff's faith requires a school at that particular site. Rather, the evidence suggests that . . . plaintiff *could* operate its school at another location in the surrounding area . . . . In other words, plaintiff may operate a faith-based school, but it must do so on property that is zoned for schools. . . . [T]he denial of the variance does not constitute a substantial burden on plaintiff's religious exercise and, therefore, the trial court correctly granted summary disposition to defendants on the RLUIPA claims. [*Id*. at 455 (citations omitted; emphasis in original).]

Similarly, the record demonstrates that GLS could locate a church at some other location within the Township as long as the property chosen has a 200-foot street frontage and otherwise complies with the ordinance. Failing that, if the alternative property more closely complies with the ordinance requirement, it could qualify for a variance. GLS makes no argument whatsoever that the particular parcel of property on which it would like to place the facility has any religious significance or is otherwise unique in any way. Accordingly, implementation of the ordinance against GLS's use of this particular piece of property does not constitute a substantial burden under the RLUIPA, and we reverse the decision of the trial court.

D. GLS'S CONSTITUTIONAL CLAIMS

The Township argues that the trial court erred by determining that its application of the ordinance to reject GLS's proposed building plan was in violation of the rights of GLS's members to freely exercise their

religion, to freely associate, and to be afforded equal protection under the United States and Michigan constitutions.[22] The trial court decided that GLS had not been afforded its rights under these three constitutional theories largely on the basis of its determination that the RLUIPA had been violated. Because we have determined that the RLUIPA was not violated, that reasoning cannot serve as a basis for concluding that the constitutional claims GLS raises are valid.[23] Instead, we turn to an analysis of each of those claims under applicable caselaw.

This Court reviews constitutional questions de novo. *Dep't of Transportation v Tomkins*, 481 Mich 184, 190; 749 NW2d 716 (2008). Likewise, we review challenges to the constitutionality of a zoning ordinance de novo on appeal. *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995).

We begin our analysis by noting that, with respect to GLS's constitutional claims concerning free exercise and equal protection, there are no significant differences between the Michigan and United States constitutions with regard to the rights afforded or their interpretation. *Advisory Opinion re Constitutionality of 1970 PA 100*, 384 Mich 82, 105; 180 NW2d 265 (1970) (Free Exercise Clause); *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 716; 575 NW2d 68 (1997) (Equal Protection Clause). Further, the freedom of association claim arises solely out of the United States Constitution; it

[22] In response, GLS goes to great lengths to describe the religious hostility, animus, and discriminatory intent of various township officials. All of that argument applies to the decision that GLS is not a church, however, so it is inapposite to this Court's review of GLS's claims that its constitutional rights were violated with respect to the variance decision.

[23] We express no opinion regarding the propriety of the trial court's approach or its assumption that, if the RLUIPA was violated, so was the constitution with respect to these rights.

has not been recognized as a right under the Michigan Constitution. Accordingly, we analyze these questions largely on the basis of federal precedents.

The Free Exercise Clause does not relieve an individual from the obligation to comply with neutral laws of general applicability. *Employment Div, Dep't of Human Resources of Oregon v Smith*, 494 US 872, 878-879; 110 S Ct 1595; 108 L Ed 2d 876 (1990). A law is neutral if, both on its face and in its implementation, its object is something other than the infringement or restriction of religious practices. *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 533; 113 S Ct 2217; 124 L Ed 2d 472 (1993); *Grace United Methodist Church v City Of Cheyenne*, 451 F3d 643, 649-650 (CA 10, 2006). The record in this case amply demonstrates that neither the ordinance requirement that the parcel have 200 feet of frontage on a major street nor the decision to deny GLS a variance from that requirement runs afoul of the Free Exercise Clause under these principles. Instead, the record demonstrates that the street frontage requirement and its imposition on GLS was a valid exercise of a generally applicable scheme to accommodate competing interests within the Township, traffic issues, and other community concerns. See, e.g., *Village of Euclid v Ambler Realty Co*, 272 US 365; 47 S Ct 114; 71 L Ed 303 (1926).

Freedom of association claims like those GLS raises are tested under a three-part analysis: A zoning ordinance does not violate the United States Constitution if it (1) is content neutral, (2) is narrowly tailored to serve a legitimate governmental objective, and (3) leaves open ample channels of alternative means of association. *Ward v Rock Against Racism*, 491 US 781, 791; 109 S Ct 2746; 105 L Ed 2d 661 (1989); *Mothershed v Supreme Court Justices*, 410 F3d 602, 611-612 (CA 9, 2005). The

200-foot street frontage requirement satisfies this test. It applies to all churches regardless of the message they espouse and is, therefore, content neutral. There is no apparent manner, and GLS suggests none, in which the ordinance might be more narrowly tailored to meet the valid traffic and other purposes that the record demonstrates it advances. As explained earlier, the ordinance leaves open other channels for GLS to exercise its right to associate, on other parcels of property within the Township.

The equal protection clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v Cleburne Living Ctr*, *Inc,* 473 US 432, 439; 105 S Ct 3249; 87 L Ed 2d 313 (1985). Accordingly, the first question has to be whether GLS demonstrated on the record that it was treated differently from some similarly situated church. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 336-337; 675 NW2d 271 (2003). With respect to the variance request, the record here shows that all churches within the Township have been treated alike. Almost all have been allowed only on parcels of property that have a 200-foot street frontage. The few exceptions have a street frontage available that is much closer to that requirement, in comparison to the parcel on which GLS sought to locate its proposed building. Therefore, GLS has failed to show that it has been treated differently from any similarly situated church.

In sum, we conclude that the trial court erred in determining that these three constitutional claims were valid under the facts of this case.

We reverse the trial court's decision affirming the ZBA conclusion that the proposed building is not a church under the zoning ordinance. We affirm the

decision of the ZBA denying GLS's variance request. We remand for entry of an order granting defendants summary disposition of GLS's statutory and constitutional claims. We do not retain jurisdiction.

TENNECO INC v AMERISURE MUTUAL INSURANCE COMPANY

Docket No. 275861. Submitted May 13, 2008, at Detroit. Decided September 9, 2008. Approved for publication October 30, 2008, at 9:10 a.m.

Tenneco Inc., the successor corporation of Monroe Auto Equipment Company, brought an action in 2003 in the Monroe Circuit Court against Amerisure Mutual Insurance Company, the successor of Michigan Mutual Insurance Company, seeking a declaration that the defendant is liable under insurance policies issued from 1956 to 1978 for all environmental cleanup expenses incurred by the plaintiff for groundwater contamination at several of Monroe's manufacturing plants and nearby landfills and seeking damages for breach of contract. The defendant moved for summary disposition, contending that it was not liable under the policies because of the plaintiff's failure to satisfy the policies' notice provisions and because the plaintiff made voluntary payments and entered into settlements without the defendant's approval in violation of provisions of the insurance policies. The defendant also claimed that the action was barred by the doctrine of laches or by the running of the period of limitations applicable to actions for breach of contract. The plaintiff filed a cross-motion for summary disposition, claiming that the language of the policies required the defendant to pay the plaintiff's claims. The court, Joseph A. Costello, Jr., J., entered several orders, including one denying the defendant's motion for summary disposition with regard to the notice, laches, and voluntary payment issues. The court also determined that the defendant had not established that it was prejudiced by the plaintiff's failures or action. Following the denial of the defendant's motion for reconsideration, the defendant appealed by leave granted.

The Court of Appeals *held*:

1. The plaintiff failed to provide the defendant any notice of governmental environmental cleanup demands, the functional equivalent of a lawsuit, or of any private third-party claims or demands. The failure to provide the notice required by the policies deprived the defendant of the opportunity to promptly contest its liability to the insured, participate in settlement negotiations, or

contest the plaintiff's liability. Prejudice to the defendant is clear because the plaintiff waited years after its liability had been cemented by its own settlements, stipulations, and consent decrees before seeking insurance payments. The trial court erred by not granting the defendant summary disposition on this issue.

2. The plaintiff's lawsuit is time-barred by the six-year statute of limitations applicable to actions for breach of contract, or under the equitable doctrine of laches.

3. The plaintiff voluntarily entered into third-party settlements, stipulations, and consent decrees with governmental agencies to take remedial action regarding environmental damages. The clear and unambiguous "voluntary payment" and the "no actions" conditions precedent in the policies preclude the defendant's liability, and the defendant is not required to prove actual prejudice to its rights. The trial court erred by not granting the defendant summary disposition on this basis as well. The orders denying the defendant's motions for summary disposition must be reversed and the matter must be remanded for the entry of a judgment in favor of the defendant.

Reversed and remanded.

1. INSURANCE — LIABILITY INSURANCE — NOTICE TO INSURERS OF OCCURRENCES — FAILURE TO PROVIDE NOTICE TO INSURERS — PREJUDICE TO INSURERS.

An insurer who seeks to cut off its responsibility under a liability insurance policy on the ground that its insured did not comply with a provision in the policy that requires notice of an occurrence to which the policy may apply immediately or within a reasonable time must establish actual prejudice to its position.

2. LIMITATION OF ACTIONS — DECLARATORY JUDGMENTS.

A statute of limitations that bars the granting of relief on the plaintiff's underlying substantive claim also bars the same claim when stated as one seeking declaratory relief.

3. LIMITATION OF ACTIONS — INSURANCE — EQUITY — LACHES.

An insured's breach of a condition in an insurance policy requiring the insured to give the insurer notice of an occurrence to which the policy may apply or notice of subsequent claims, suits, demands, or other process, when combined with the insured's inexcusable delay of longer than the statutory limitations period before filing a suit for a claim under the policy, may provide exceptional circumstances or compelling equities for the doctrine of laches to bar the insured's claim.

4. INSURANCE — LIABILITY INSURANCE — VOLUNTARY PAYMENTS BY INSURED — PREJUDICE TO INSURERS.

An insured that, in response to governmental demands that are the equivalent of a lawsuit, enters into stipulations and consent decrees with governmental agencies for remedial action regarding environmental damage without informing its insurer may be found to violate an insurance policy clause prohibiting "voluntary" payments or the assumption of obligations without the insurer's consent if the insured had other options available to it under the terms of the policy, such as demanding that the insurer participate in the matter or provide a defense; an insurer may seek enforcement of a voluntary payment provision without showing that its rights were actually prejudiced.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Michael J. Reynolds*), and *Jenner & Block, L.L.P.* (by *Patricia A. Bronte, Elsa Y. Trujillo, Barry Levenstam, Christopher C. Dickinson,* and *Jennifer A. Hasch*), for the plaintiff.

Kelley, Casey & Moyer, P.C. (by *Timothy F. Casey* and *Nicole E. Wilinski*), for the defendant.

Before: BANDSTRA, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. In this action for declaratory relief and damages for breach of contract, plaintiff, Tenneco Inc., contends that environmental cleanup costs it incurred are covered under general liability and umbrella policies issued by defendant's predecessor, Michigan Mutual Insurance Company (MMIC), to plaintiff's predecessor, the Monroe Auto Equipment Company (Monroe), for periods from July 1, 1956, to July 1, 1978. Defendant Amerisure Mutual Insurance Company appeals by leave granted the trial court's denial of its various motions for summary disposition that were based on the grounds that plaintiff failed to satisfy the policies' notice provisions, that plaintiff forfeited any coverage by entering into settlements and also making

"voluntary" payments that defendant had not approved, and that plaintiff's lawsuit was time-barred. Plaintiff filed a cross-motion for summary disposition, asserting that under the policies' definition of "occurrence," an "injury in fact" during the policy period triggered coverage and that the policy language required defendant to pay "all sums" that plaintiff became liable to pay as damages for injury or property damage. We reverse and remand for entry of a judgment for the defendant.

I. SUMMARY OF FACTS AND PROCEEDINGS

Monroe used solvents containing volatile organic compounds, trichloroethylene (TCE) and trichloroethane (TCA), to manufacture auto parts at facilities in Hartwell, Georgia, beginning in 1956; in Paragould, Arkansas, beginning in 1970; and in Cozad, Nebraska, beginning in 1961. Unaware of the danger posed to the environment, Monroe used the solvents through the mid-1980s, disposing of wastewater and sludge containing TCE and TCA at the sites of its manufacturing plants and at nearby landfills in Arkansas (Finch Road), and Nebraska (Sandhills). As a result, TCE and TCA contaminated the groundwater and Monroe incurred substantial environmental cleanup costs in the years since the contamination was discovered. Plaintiff filed this lawsuit in 2003 seeking a declaration that defendant, the corporate successor to MMIC, is liable for all environmental cleanup expenses plaintiff incurred over the years because defendant insured Monroe under general liability and umbrella policies from July 1, 1956, to July 1, 1978.

Defendant filed several motions for summary disposition, contending that the undisputed facts showed that plaintiff had failed to satisfy the policies' notice

provisions as a condition precedent to liability, and that plaintiff had forfeited any coverage by making "voluntary" payments and entering into settlements that defendant had not approved. Defendant also contends that this action is barred either by laches or the running of the six-year period of limitations applicable to contract actions. Plaintiff filed a cross-motion for summary disposition, asserting that under the policies' definition of "occurrence,"[1] coverage was "triggered" by an "injury in fact"[2] during the policy period and that the policy language required defendant to pay "all sums" that plaintiff became liable to pay as damages for injury or property damage.

The policy conditions pertinent to this appeal involve (1) notice of occurrence, (2) notice of claim, (3) voluntary payment, and (4) action against the company. They provide:[3]

> 4. **Insured's Duties in the Event of Occurrence, Claim or Suit**
>
> (a) In the event of an **occurrence**, written notice containing particulars sufficient to identify the **insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses,

[1] The policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

[2] See *Gelman Sciences, Inc v Fidelity & Cas Co,* 456 Mich 305, 319-320, 329; 572 NW2d 617 (1998), overruled in part *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 63 (2003). In this similar case, applying similar policy language, the Court held that an "actual injury must occur during the time the policy is in effect in order to be indemnifiable, i.e., the policies dictate an injury-in-fact approach." *Gelman, supra* at 320.

[3] Both parties assert that the pertinent provisions of the various policies are substantially the same; they are paragraphs 8, 9, 10, and 11 in some policies.

shall be given by or for the **insured** to the company or any of its authorized agents as soon as practicable.

(b) If a claim is made or suit is brought against the **insured**, the **insured** shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(c) The **insured** shall cooperate with the company and, upon the company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **insured** because of injury or damage with respect to which insurance is afforded under this policy; and the **insured** shall attend hearings and trials and assist in securing and giving evidence and obtaining attendance of witnesses. The **insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

5. **Action Against Company[.]** No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the **insured's** obligation to pay shall have been finally determined either by judgment against the **insured** after actual trial or by written agreement of the **insured**, the claimant and the company. [Emphasis in original.]

A. EVENTS AT COZAD, NEBRASKA

Monroe wrote a February 15, 1985, letter to MMIC stating:

This is to put you on notice of a potential claim at our plant in Cozad, Nebraska involving sudden and accidental discharge(s) to the environment. The effects of the discharge(s) were first noted in Spring and Summer 1984. Some or all of the discharges may have occurred prior to July 1, 1978.

Samuel Mostkoff, Monroe's legal counsel, sent a "follow-up" letter in October 1985 informing MMIC that, as of July 31, 1985, Monroe's cleanup costs at its Cozad plant were $454,323.00 and that Monroe was continuing to document additional expenses.

Defendant acknowledged receipt of Mostkoff's letter in correspondence dated November 1, 1985, and informed Monroe that its February 1985 letter "appears to have been misplaced." Defendant also requested all available documentation regarding the costs incurred and reserved its rights regarding coverage and compliance with the terms and conditions of the policies.

Mostkoff responded with a November 7, 1985, letter stating that the documentation defendant sought was "quite voluminous." He requested that either defendant's claims examiner "indicate exactly the information you are looking for," or that someone come to Monroe's facility for a meeting. It does not appear that defendant acted on this request.

On November 15, 1985, plaintiff and the state of Nebraska agreed to investigate and remediate groundwater contamination at the Cozad plant.

In a letter dated April 17, 1986, plaintiff informed defendant:

> This is to advise you that we have recently performed a review of sources of the groundwater contamination for the State of Nebraska. In connection with this review we have identified that some of the contamination is related to spills which occurred in connection with the delivery of these chemicals to our plant. We are reviewing our records and files, as well as the recollections of our employees, to determine the suppliers of these chemicals and/or the distributors/transporters of these chemicals to our Cozad, Nebraska plant.

> Once this information is obtained, it will be forwarded to you for your use in filing claims against these potentially-liable parties for their role in the groundwater contamination.
>
> We continue to accumulate documentation on our expenditures at Cozad in connection with the groundwater clean-up. Through December 1985 we had expended approximately $850,000 in activities related to the clean-up. These records are available for your review at Monroe headquarters.

Defendant asserts that plaintiff never documented any pre-1978 spills, nor did plaintiff demand a defense or seek indemnity. Apparently, there have never been any third-party claims or suits or potentially responsible party (PRP) letters sent to plaintiff regarding its Cozad plant.

On February 3, 1993, plaintiff sent defendant a letter (the 1993 status letter) purporting to enclose "1993 semi-annual status reports" concerning "significant environmental claims" at all five sites (the three manufacturing plants and two landfills). The parties dispute whether the referenced "status" reports were ever actually sent to defendant; however, defendant asserts this 1993 status letter was the last communication it received from plaintiff before it filed this lawsuit in 2003.

B. EVENTS AT THE SANDHILLS LANDFILL, NEBRASKA

The Sandhills landfill is located approximately nine miles north of the city of Cozad. Plaintiff disposed of wastewater and sludge from its Cozad plant at Sandhills from August 1977 to December 1982. As part of its stipulation with the state of Nebraska on November 15, 1985, pertaining to the Cozad plant, plaintiff was precluded from disposing of sludge at the landfill. On

August 28, 1987, the Nebraska Department of Justice notified plaintiff that the Sandhills landfill had been referred to it for enforcement action. Subsequently, on September 14, 1987, plaintiff entered into a consent decree with the state of Nebraska. Other than plaintiff's letters stating that it had incurred cleanup expenditures, plaintiff did not notify defendant of any demands or claims asserted against plaintiff, nor did plaintiff demand a defense or seek indemnity.

C. EVENTS AT HARTWELL, GEORGIA

On June 26, 1986, Monroe sent MMIC a letter stating the following:

> This is to put you on notice of a potential claim at our plant in Hartwell, Georgia involving sudden and accidental discharge(s) to the environment. The effects of the discharge(s) were first confirmed in January, 1986. Georgia was notified in March 1986. Some or all of the discharge(s) may have occurred prior to July 1, 1978.

Defendant informed plaintiff in a January 30, 1987, letter that, "[a]s of this date, we have not been notified that a claim in fact has been made." Defendant also reserved its rights under the policy "[i]f and when a claim is made."

The next information plaintiff provided defendant regarding its Hartwell plant was the 1993 status letter. Defendant responded to the status letter by informing plaintiff that the information provided "cannot be matched to any prior claim files" and by requesting additional policy and claim information. The parties did not communicate further before the 2003 lawsuit.

Plaintiff contends that in the fall of 1986 the Georgia environmental protection agency of its Department of Natural Resources required plaintiff to submit reports

on the results of test wells monitoring groundwater contamination. Plaintiff submitted a report to the Georgia Environmental Protection Division (GEPD) on January 30, 1987. On June 29, 1994, the GEPD notified plaintiff that its Hartwell property would be added to Georgia's hazardous site inventory and instructed plaintiff to submit more environmental data.

On February 7, 1995, the GEPD notified plaintiff that it was a potentially responsible party (PRP) for contamination at the Hartwell plant site. Subsequently, on April 2, 1996, plaintiff entered into a consent order with the state of Georgia regarding remediation at the plant. In addition, between 1989 and 1995, plaintiff settled third-party claims and purchased property adjacent to the plant. Plaintiff did not notify defendant of its interaction with the GEPD or of the third-party settlements.

D. EVENTS AT PARAGOULD, ARKANSAS

On March 23, 1988, plaintiff sent defendant a letter that stated:

> This is to put you on Notice of a potential claim at our plant in Paragould, Arkansas involving sudden and accidental discharge(s) to the environment. The effects of the discharge(s) were first noted in April, 1986. Some or all of the discharges may have occurred prior to July 1, 1978.

Defendant responded in a letter dated April 19, 1988, citing the policies' conditions and informing plaintiff that "because of your failure, promptly, to report the occurrence of April of 1986 to the Michigan Mutual Insurance Company, you are in violation of that duty of your policy" that required notice of an occurrence, claim, or suit. Defendant indicated that it would investigate the loss, but reserved all rights under the policy, including denying coverage.

Plaintiff responded to defendant's reservation of rights in a letter dated June 2, 1988. Plaintiff informed defendant that it notified defendant as soon as it became aware that the policies might be involved. Plaintiff also insisted that defendant had not been prejudiced.

Plaintiff also wrote in a March 8, 1991, letter to defendant:

> Please consider this letter a supplement to our letter of March 23, 1988 in which we put you on notice of a potential liability claim concerning accidental discharge(s) into the environment at our Paragould, Arkansas manufacturing facility. A related site has been added to the Environmental Protection Agency's Superfund list. This letter is our notice to you of the potential additional liability due to this action. [4]

Defendant asserts that the 1993 status letter was the last communication from plaintiff to defendant regarding the Paragould plant before the 2003 lawsuit. Apparently, no third-party claims were filed against plaintiff relating to contamination at the Paragould plant.

E. EVENTS AT THE FINCH ROAD LANDFILL, ARKANSAS

The Finch Road landfill, also referred to as the Paragould pit or the Monroe Auto pit, is located seven miles from plaintiff's Paragould plant in Arkansas. Plaintiff dumped its waste sludge at this site from March 1973 to sometime in 1978. Groundwater contamination was discovered at the site in July 1987. On August 30, 1990, the site was added to a national priorities list as part of the Superfund[5] process under

[4] On appeal, plaintiff argues the "related site" mentioned in the letter is the Finch Road landfill.

[5] See 26 USC 9507.

the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 USC 9601 *et seq*. In a January 9, 1991, letter, the United States Environmental Protection Agency (EPA) notified plaintiff it was a PRP regarding the "Monroe Auto Pit Superfund Site." Plaintiff contends that its March 8, 1991, letter gave defendant notice of this EPA action, but defendant asserts that plaintiff's brief on appeal is the first time plaintiff has contended that the Paragould pit was the "related site" referred to in that letter. On March 18, 1991, plaintiff received another letter from the EPA notifying plaintiff it had 60 days to agree to conduct a remedial investigation and feasibility study or the EPA would do so itself and sue plaintiff for the expense under CERCLA. On June 28, 1991, plaintiff entered into a consent order with the EPA requiring remedial investigation and response.

On November 18, 1996, the Arkansas equivalent of the EPA sent its own version of a PRP letter to plaintiff regarding the "Monroe Auto Superfund Site." On February 5, 1998, plaintiff entered into a consent order with the Arkansas agency for remedial response.

In addition to agreeing to take remedial action with federal and state environmental agencies, plaintiff settled some third-party claims arising out of the contamination of properties adjacent to the Finch Road landfill.

Defendant asserts that plaintiff failed to provide it any notice of either governmental or private third-party demands regarding the landfill and, further, that plaintiff made no specific demand for coverage.

F. TRIAL COURT RULINGS

As noted above, defendant moved for summary disposition on the basis that plaintiff failed to satisfy the

policies' notice provisions, that plaintiff forfeited any coverage by entering into settlements that defendant had not approved and by making "voluntary" payments, and that plaintiff's lawsuit was time-barred either by the doctrine of laches, or by the running of the six-year period of limitations applicable to contract actions. Plaintiff filed a cross-motion for summary disposition, asserting that under the policies' definition of "occurrence," coverage had been "triggered" by an "injury in fact" during the policy period and that the policy language required defendant to pay "all sums" that plaintiff became liable to pay as damages for injury or property damage. The motions were argued on September 22, 2006.

The trial court issued several orders deciding the various motions. Pertinent to the present appeal, the trial court entered a single order denying defendant's motion for summary disposition that was based on notice, laches, and voluntary payment. In its order, the trial court stated that laches did not apply because plaintiff's action was not an equitable action. Although the court noted that the applicable statute of limitations governed, the court did not further address the issue. With respect to the policies' "voluntary payment" condition, the trial court suggested that the condition may not apply to payments required by a governmental agency and that the far-reaching powers of the government rendered plaintiff's response something other than voluntary. With respect to the "notice" condition, the trial court stated that plaintiff notified defendant of a potential claim when various governmental agencies advised plaintiff of the contamination. Further, the court noted that defendant stated that it would investigate, but both parties "dropped the ball" by failing to follow through. Because of defendant's own failings, the

trial court reasoned that defendant could not establish that it was prejudiced by plaintiff's failings.

With respect to plaintiff's motion, the trial court ruled that an "injury-in-fact" triggered coverage under the policies of insurance. With respect to allocation, the trial court adopted defendant's argument that "the policies should be applied using the 'time-on-the-risk' theory."

Defendant moved for reconsideration. On reconsideration, the trial court recognized that laches could apply to a breach of contract case where there were "compelling equities" or when withholding relief would be "unfair and unjust." But to apply laches, the court concluded, would require fact-finding and, therefore, the court denied reconsideration of defendant's motion regarding laches. The trial court also ruled that determining when the period of limitations began to run presented questions of fact inappropriate for summary disposition. Further, the court suggested that plaintiff's ongoing payments to remediate environmental damage "have the result of defining the claim as an active occurring event." Also, the court cryptically noted that "[t]he statute of limitations could be found to toll after payments are completed." The court further stated, "The statute of limitations could therefore toll when the government is satisfied that the claim or harm has been rectified." Although to toll the statute is to stop the limitations period from running, the context of the court's comments suggests it meant the opposite.

The trial court agreed with defendant that it did not fully address defendant's arguments regarding plaintiff's "voluntary payments" in its first ruling, but it again denied relief after concluding that a question of fact existed regarding whether plaintiff's payments were truly "voluntary" when it paid pursuant to gov-

ernmental demands. The trial court also ruled that whether plaintiff provided sufficient notice presented the essence of a material factual question for the jury to resolve.

This Court granted defendant's application for leave to appeal on July 17, 2007. Plaintiff filed a cross-appeal by right on August 6, 2007, pursuant to MCR 7.207(A)(1).

II. STANDARD OF REVIEW

The parties' motions for summary disposition implicate MCR 2.116(C)(10) (no genuine issue of material fact), and MCR 2.116(C)(7) (immunity granted by law). This Court reviews de novo the trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When considering a motion under subrule C (10), the court must view the proffered evidence in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. A trial court properly grants the motion when the proffered evidence fails to establish any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

When addressing a motion under subrule C (7), the trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). If the material facts are not disputed, this Court reviews de novo as a question of law whether a claim is barred by the statute of

limitations. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

This case also requires the interpretation of an insurance contract. The interpretation of clear contractual language is an issue of law, which is reviewed de novo on appeal. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). Like any other contract, an insurance policy is an agreement between the parties. *Heath v State Farm Mut Automobile Ins Co*, 255 Mich App 217, 218; 659 NW2d 698 (2003). The primary goal in the interpretation of an insurance policy is to honor the intent of the parties. *Klapp, supra* at 473. If an ambiguity in the contract cannot be resolved, it should be strictly construed against the drafter. *Id*. at 471-474; *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003). Further, determining the scope of coverage under an insurance policy is a separate question from whether liability is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). While exclusions are strictly construed in favor of the insured, this Court will read the insurance contract as a whole to effectuate the intent of the parties and enforce clear and specific exclusions. *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004).

With respect to defendant's claim of laches, this Court reviews a trial court's equitable decisions de novo, but the findings of fact supporting an equitable decision are reviewed for clear error. *Yankee Springs Twp v Fox,* 264 Mich App 604, 611; 692 NW2d 728 (2004). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005).

III. ANALYSIS

A. NOTICE

We conclude that plaintiff's "potential claim" letters were arguably sufficient to satisfy the policies' notice of occurrence condition, at least for the purposes of summary disposition. See *Wendel v Swanberg*, 384 Mich 468, 478 n 8; 185 NW2d 348 (1971) (the reasonableness of the notice given is usually a question for the trier of fact). Further, in light of defendant's failure to investigate, and because, as we hereinafter conclude, defendant's liability is precluded by other conditions or exclusions, defendant cannot establish prejudice from defective notice of an "occurrence."

On the other hand, the unrebutted evidence establishes that plaintiff failed to comply with the policies' condition requiring immediate notice of every claim, suit, demand, notice, or summons. This condition is independent of the condition requiring notice of an "occurrence." See *Koski v Allstate Ins Co*, 456 Mich 439, 445; 572 NW2d 636 (1998). Because defendant forever lost the opportunity to contest plaintiff's liability, engage in settlement negotiations, or seek a judicial determination of its liability to plaintiff under the policies, defendant has established the prejudice necessary to terminate its liability to plaintiff. *Id*. at 447-448; Wood v Duckworth, 156 Mich App 160, 163-164; 401 NW2d 258 (1986).

We conclude that both parties' tangential arguments lack merit. Plaintiff bases an argument on estoppel. However, the reasoning of *Meirthew v Last*, 376 Mich 33; 135 NW2d 353 (1965), simply does not apply to these facts because plaintiff never asked for, and defendant never undertook, plaintiff's defense; consequently, a duty of complete disclosure did not arise. A party may

be estopped to assert a fact when (1) the party by representation, admissions, or silence intentionally or negligently induces another party to believe certain facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of those alleged facts. *Van v Zahorik*, 460 Mich 320, 335; 597 NW2d 15 (1999). Silence or inaction alone is insufficient to invoke estoppel absent a legal or equitable duty to disclose. *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). In *Meirthew*, the duty of full disclosure arose because the same counsel represented both the insurer and the insured in the defense of litigation against the insured, but the insurer failed to disclose the specific policy conditions it would rely on to deny coverage in the event of an adverse verdict. *Meirthew*, *supra* at 36-38. Here, defendant responded to plaintiff's notices of "potential claim" by informing plaintiff that it was reserving its rights to deny coverage on the basis of all the terms and conditions of the policies. Plaintiff does not allege, nor can it establish, that justifiable reliance caused it prejudice. See *Allstate Ins Co v Keillor (After Remand)*, 450 Mich 412, 416 n 2; 537 NW2d 589 (1995) (holding that the insurer was not estopped from asserting a policy defense not contained in its reservation of rights letter where the delay was not unreasonable and the insured was not prejudiced). Further, it is plaintiff's failure to notify defendant of claims, suits, and demands against it by third parties and governmental agencies, an independent policy condition, that prejudiced defendant under the facts of this case.

Likewise, we reject defendant's reliance on *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007). The Supreme Court in that case held that the 120-day period of MCL 691.1404(1) within which to give

notice to invoke the exception to governmental immunity with respect to a defective highway should be enforced as written, and the Court also overruled prior decisions holding that the failure to comply with the statute's terms would not bar recovery absent a showing of prejudice. Defendant asserts that the same reasoning applies by analogy to the insurance policy notice conditions, i.e., that the policy language does not require that defendant show that plaintiff's failings in providing notice caused defendant prejudice. This argument is based on an inapt analogy and would require this Court to ignore longstanding Michigan Supreme Court precedent. The requirement of MCL 691.1404(1) to give notice within 120 days after an injury caused by a defective highway is far different from a provision in an insurance policy requiring notice of an "occurrence," an event neither expected nor intended, as soon as practicable. But regardless of the merits of defendant's argument, this Court is bound by the rule of stare decisis to follow the decisions of our Supreme Court. *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007). Our Supreme Court has held "that an insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." *Koski*, *supra* at 444.

"Provisions in liability insurance contracts requiring the insured to give the insurer immediate or prompt notice of accident or suit are common, if not universal. The purpose of such provisions is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims." *Wendel*, *supra* at 477. The Court further noted that mere delay in complying with a notice condition would not forfeit coverage "because

such provisions are construed to require notice within a reasonable time." *Id*. at 478, citing *Kennedy v Dashner,* 319 Mich 491; 30 NW2d 46 (1947), and *Exo v Detroit Automobile Inter-Ins Exch*, 259 Mich 578; 244 NW 241 (1932). Pertinent to this case, the *Wendel* Court stated that "[p]rejudice to the insurer is a material element in determining whether notice is reasonably given and the burden is on the insurer to demonstrate such prejudice." *Wendel, supra* at 478 (citations omitted). These principles apply equally to "notice of accident and notice of suit although their application will differ in varying factual contexts." *Id*. at 478-479, citing *Weller v Cummins*, 330 Mich 286, 293; 47 NW2d 612 (1951). The *Koski* Court, also citing *Weller*, confirmed this last principle. *Koski*, *supra* at 445. But giving notice of an "occurrence" will not relieve an insured of its obligation to provide notice of subsequent claims, suits, demands, or other process. See *Aetna Cas & Surety Co v Dow Chem Co*, 10 F Supp 2d 800, 811 (ED Mich, 1998).

An insurer suffers prejudice when the insured's delay in providing notice materially impairs the insurer's ability to contest its liability to the insured or the liability of the insured to a third party. *West Bay Exploration Co v AIG Specialty Agencies of Texas, Inc*, 915 F2d 1030, 1036-1037 (CA 6, 1990). Although the question of prejudice is generally a question of fact, *Wendel, supra* at 478 n 8, it is one of law for the court when only one conclusion can be drawn from the undisputed facts. See *Wehner v Foster*, 331 Mich 113, 120-122; 49 NW2d 87 (1951). Further, "Michigan law does *not* require an insurer to prove that but for the delay it would have avoided liability." *West Bay*, *supra* at 1037 (emphasis in original).

> In determining whether an insurer's position has actually been prejudiced by the insured's untimely notice,

> courts consider whether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4) to contest its liability to its insured. [*Aetna Cas*, *supra* at 813.]

Giving plaintiff the benefit of the doubt, we conclude that it is possible that its "potential claim" letters gave defendant notice of an "occurrence" at plaintiff's Cozad, Hartwell, and Paragould plants. Further, giving plaintiff the benefit of the doubt, a reasonable fact-finder might determine plaintiff's March 8, 1991, letter referring to a "related site" portending "additional liability" with respect to plaintiff's Paragould plant might have given notice of an "occurrence" with regard to the Finch Road landfill. But there is nothing from which to infer that plaintiff gave defendant notice of an occurrence at the Sandhills landfill. Plaintiff appears to argue that notice of an occurrence at its plants also included notice of an occurrence at the nearby landfills. But the notices regarding Paragould and Cozad mention only plaintiff's "plant," not a landfill, and, because the plants and the landfills are miles apart, the notices failed to identify the "place" of the "occurrence."

But even if plaintiff complied with the policies' condition requiring notice of an "occurrence," reasonable fact-finders could only conclude that plaintiff failed to give notice of subsequent claims, suits, or demands. In this regard, both our Supreme Court and this Court have held that governmental agency demands for environmental remedial action are "suits" within the meaning of this standard liability insurance policy condition. In *Michigan Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 573; 519 NW2d 864 (1994), overruled in part *Wilkie*, *supra* at 63, our Supreme Court, in the

context of an EPA demand for environmental remediation under CERCLA, held "that the legal proceeding initiated by the receipt of [a PRP letter] is the functional equivalent of a suit brought in a court of law." Similarly, this Court in *South Macomb Disposal Auth v American Ins Co* (*On Remand*), 225 Mich App 635, 668; 572 NW2d 686 (1997), held that state agency demands for environmental remediation under state environmental laws "constituted a 'suit' for purposes of triggering the insurers' duty to defend." Plaintiff contends that its 1980s and early 1990s correspondence placed defendant on notice that it faced governmental demands for environmental cleanup. While plaintiff, in some of this correspondence, stated that it had incurred environmental cleanup expenses at its Cozad plant and, in other correspondence, suggested that state or federal agencies may have been involved in determining that groundwater contamination had occurred, no correspondence from plaintiff stated that it had received a PRP letter or other governmental demand for remedial action, or that it had received a private third-party claim, suit, or demand. Further, it appears undisputed that after providing defendant with the initial notices, plaintiff settled several third-party claims and entered into several stipulations and consent orders with various governmental agencies for remedial action, all without providing defendant any specific notice of its actions.

We conclude that plaintiff prejudiced defendant by not complying with the condition requiring it to give notice of any suits or demands even if plaintiff notified defendant of an "occurrence." Although an "occurrence" triggers coverage under the policies, the policies, read as a whole, plainly provide that defendant's liability under the policies is limited to plaintiff's legal obligation to pay being determined after an actual trial

or by "agreement of the insured, the claimant, and the [insurance] company." Further, the policies prohibit the insured from voluntarily paying its believed legal obligation without the consent of the insurance company. In sum, the insurance policies cover liability to third parties. See *Gelman Sciences, Inc v Fidelity & Cas Co,* 456 Mich 305, 312; 572 NW2d 617 (1998), overruled in part on other grounds *Wilkie, supra* at 63. It is a third-party suit that triggers the insurer's duty to defend the insured and, ultimately, to indemnify the insured for sums the insured is legally obligated to pay. See *Michigan Millers*, *supra* at 573-575, and *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450-451; 550 NW2d 475 (1996) (general liability policy contained two separate, but related, duties of the insurer: the duty to indemnify the insured for sums the insured is legally obligated to pay for covered bodily injury or property damage and the duty to defend any suit against the insured seeking damages because of an occurrence).

Without regard to whether evidence has been lost or might be available from other sources, the lack of notice of claims, suits, or demands has forever cost defendant the opportunity to contest plaintiff's liability, engage in settlement negotiations, or seek a judicial determination of its liability to plaintiff under the policies. Thus, defendant has established the prejudice necessary to preclude any liability it may have had to plaintiff. Specifically, the lack of notice has materially impaired its ability to contest its liability to plaintiff and plaintiff's liability to the government for cleanup or for third-party claims. *West Bay*, *supra* at 1036-1037. This is so even if, had defendant been notified of suits or claims, the outcome might not have been different. *Id*. at 1037. Our conclusion that defendant has satisfied its burden of showing that it was prejudiced as a matter of

law is supported by the reasoning employed in *Koski*, *supra*; *Wood, supra*; and *Wehner*, *supra*.

The *Wehner* Court credited the unrebutted testimony of the insurer's assistant claims manager as establishing a prima facie case of prejudice from late notice of an occurrence. *Wehner*, *supra* at 122. The claims manager testified that had the insurer been promptly notified, it could have determined the question of liability, obtained competitive cost estimates regarding damages, attempted to settle the claim if there were liability, and established a reserve for future payments if damage appeared extensive. *Id*. 118-119. Defendant here lost the opportunity for a prompt determination of its liability to the insured, lost the opportunity to negotiate settlements with governmental agencies and third parties, and lost the opportunity to build reserves for future payments if liability existed and damage appeared extensive.

The insured in *Wood* waited 18 months before notifying the insurance company of a lawsuit against him. The Court observed that

> the insured neglected to notify the insurance company of the lawsuit until liability was virtually assured by the damaging admissions of the insured prior to notice, in direct contravention of the insurance agreement, the forfeiture clause of the policy, which provides that no action shall lie against the company unless, as a condition precedent, the insured has fully complied with all the terms of the policy, should take effect. [*Wood*, *supra* at 163-164.]

So, too, in the present case, plaintiff never notified defendant of suits, claims, or demands. It waited until after it had settled claims and entered into stipulations and consent decrees, all in contravention of policy conditions prohibiting settlements without defendant's consent.

In *Koski*, our Supreme Court held that the insurer had been prejudiced by late notice of suit even though the insurer had received prompt notice of the occurrence, which the Court referred to as "the notice-of-claim requirement." *Koski*, *supra* at 444. But the insured did not notify the insurer that a lawsuit had been filed until three months after entry of a default judgment. *Id*. This deprived the insurer of "any opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages." *Id*. at 445. Although the insurer had been notified of the underlying accident, the Court found it unreasonable to impose on the insurer " 'sentry duty' " to determine if the insured were sued. *Id*. at 446, quoting *Weaver v Hartford Accident & Indemnity Co*, 570 SW2d 367, 369 (Tex, 1978). Moreover, the *Koski* Court held that the insured was not released from complying with the notice-of-suit condition precedent to the insurer's liability by the fact that the insurer had denied coverage after notice of the accident. *Koski*, *supra* at 441, 445. On the other hand, the Court emphasized, "an insurer who knows of legal proceedings instituted against its insured, but nevertheless chooses to rest on its claim of noncoverage, faces a heavy burden in demonstrating prejudice from its insured's failure to comply with a notice provision." *Id.* at 446 n 7. Because notice of suit was not given until three months after entry of a default judgment, which was unlikely to be set aside, the Court determined that the insurer was clearly prejudiced. *Id*. at 446.

In sum, we conclude that even if plaintiff gave adequate notice of an occurrence, it subsequently failed to provide notice of governmental environmental cleanup demands—the functional equivalent of a lawsuit—and of third-party claims and demands. Plaintiff's failure to give notice of suit deprived defendant of

the opportunity to promptly contest its liability to the insured, participate in settlement negotiations, or contest plaintiff's liability. Prejudice to defendant is clear because plaintiff waited years after its liability had been cemented by its own settlements, stipulations, and consent decrees before seeking reimbursement from defendant. The trial court erred by not granting defendant summary disposition on this basis.

B. LACHES AND THE STATUTE OF LIMITATIONS

We conclude that although plaintiff styled this lawsuit as an action for a declaratory judgment, it is essentially a breach of contract claim that is governed by the six-year period of limitations. MCL 600.5807(8). Plaintiff's claim is for money damages based on defendant's alleged breach of its duties to defend and indemnify plaintiff as a result of the environmental claims asserted against it. In that regard, all events giving rise to plaintiff's claims, except one, occurred more than six years before plaintiff filed its complaint. Consequently, plaintiff's claims are generally barred by the statute of limitations. To the extent that plaintiff's claim regarding the February 5, 1998, Finch Road landfill consent order survives the statute of limitations inquiry, recovery against defendant is precluded by plaintiff's failure to give notice to defendant of the related November 18, 1996, PRP letter, as discussed in part III (A) of this opinion, or for breach of the "voluntary payments" and "no action" conditions, discussed hereafter in part III (C) of this opinion.

In *Taxpayers Allied For Constitutional Taxation v Wayne Co*, 450 Mich 119; 537 NW2d 596 (1995), our Supreme Court addressed the time limitations within which to bring claims for retrospective relief (a tax refund) and for prospective relief (injunctive and de-

claratory relief) for an alleged unconstitutional tax. The Court observed that it had to "analyze the time of accrual separately for each type of relief sought." *Id*. at 123. Regarding the refund, the claim accrued when the "wrong" occurred, MCL 600.5827, which was when the tax was assessed and became due. *Taxpayers*, *supra* at 123-124. The Court held that the pertinent one-year period of limitations, MCL 600.308a(3), applied to the refund claim. *Taxpayers*, *supra* at 122-126. But the plaintiff's claim for prospective relief from an alleged unconstitutional tax did not neatly fit a statute of limitations defense and to hold otherwise "would truncate the constitutional right." *Id*. at 127.

With respect to declaratory relief, the Court in *Taxpayers, supra* at 128, quoted with approval *Luckenbach Steamship Co v United States*, 312 F2d 545, 548 (CA 2, 1963):

> "Limitations statutes do not apply to declaratory judgments as such. Declaratory relief is a mere procedural device by which various types of substantive claims may be vindicated. There are no statutes which provide that declaratory relief will be barred after a certain period of time. *Limitations periods are applicable not to the form of the relief but to the claim on which the relief is based*." [Emphasis added.]

The Court further stated that claims for declaratory relief must necessarily be based on an underlying substantive claim to satisfy the requirement that an " 'actual controversy' " exist. *Taxpayers*, *supra* at 128. "Once a court determines which statute of limitations applies, however, the time at which the claim accrues for purposes of applying that statute depends on the type of relief sought." *Id*. at 128 n 10. "Declaratory relief may not be used to avoid the statute of limitations for substantive relief." *Id*. at 129. Consequently, a

careful reading of *Taxpayers* leads to the conclusion that when the statute of limitations would bar granting relief on the underlying substantive claim, it also bars the same claim when stated as one seeking declaratory relief. Holding otherwise is equivalent to rendering an advisory opinion on a moot issue, one for which the relief requested cannot be granted. See *Michigan Nat'l Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997).

MCL 600.5815 buttresses this analysis of *Taxpayers*. "The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. The equitable doctrine of laches shall also apply in actions where equitable relief is sought." MCL 600.5815. This Court has held that MCL 600.5815 does not preclude the application of laches to legal actions but "evidences only a legislative intent to subject equity actions to the same statute of limitations available for law actions, thereby modifying the prior judicial practice of applying a statute of limitations by analogy in an equity action." *Eberhard v Harper-Grace Hospitals*, 179 Mich App 24, 36; 445 NW2d 469 (1989). See also *Attorney General v Harkins*, 257 Mich App 564, 568-572; 669 NW2d 296 (2003), which invoked MCL 600.5815 to apply the six-year limitations period of MCL 600.5813 to an action for injunctive relief.

There is, however, a relationship between laches and the statute of limitations. *Lothian v Detroit*, 414 Mich 160, 165; 324 NW2d 9 (1982). The doctrine of laches will not ordinarily apply if a statute of limitations will bar a claim because laches is viewed as the equitable counterpart to the statute of limitations. *Eberhard, supra* at 35, citing *Lothian, supra*. If laches applies, a claim may be barred even though the period of limitations has not run. The application of laches can shorten, but never

lengthen, the analogous period of limitations. *Citizens Ins Co of America v Buck*, 216 Mich App 217, 228; 548 NW2d 680 (1996). For laches to apply, inexcusable delay in bringing suit must have resulted in prejudice. *Id*.; *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 252; 704 NW2d 117 (2005). With respect to the statute of limitations, delay alone for the prescribed period is a conclusive bar to suit. *Lothian, supra* at 165-166. Thus, laches may bar a legal claim even if the statutory period of limitations has not yet expired. *Eberhard, supra* at 35-36; *Citizens*, *supra*.

The true nature of a plaintiff's claim must be examined to determine the applicable statute of limitations. *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710; 742 NW2d 399 (2007). "[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id*. at 710-711. Here, plaintiff asserts in ¶ 36 of its first amended complaint that defendant was obligated under the insurance polices "to defend and indemnify" plaintiff with respect to the environmental claims it faced. In ¶ 37, plaintiff asserts that defendant "has denied coverage, reserved the right to refuse coverage, or otherwise failed or refused to comply with its contractual duties and obligations" regarding the environmental claims brought against plaintiff. "These breaches," plaintiff alleges in ¶ 38, have deprived plaintiff of the benefits of insurance coverage. Plaintiff, in its prayer for relief, requests "actual compensatory and consequential damages" for defendant's "breaches of its insurance contracts." Consequently, the gravamen of plaintiff's complaint is breach of contract. Specifically, plaintiff alleges that defendant breached its contractual duties (1) to defend plaintiff from the environmental claims asserted against it and (2) to indemnify plaintiff for the sums it

became legally obligated to pay as a result of environmental damage. Plaintiff seeks legal relief, i.e., money damages. Accordingly, the six-year period of limitations applicable to breach of contract actions applies. *Taxpayers*, *supra* at 128-129; *Lothian, supra* at 171-175.

In Michigan, a breach of contract claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. To determine the "wrong upon which the claim is based," the parties' contract must be examined. *Scherer v Hellstrom*, 270 Mich App 458, 463; 716 NW2d 307 (2006). Here, plaintiff alleges two wrongs. First, that defendant breached its duty to defend plaintiff from the environmental claims and, second, that defendant breached its duty to indemnify plaintiff for expenses it became legally obligated to pay for response activities. In general, "a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract." *Blazer Foods, Inc v Restaurant Properties, Inc,* 259 Mich App 241, 245-246; 673 NW2d 805 (2003). With respect to an insurer's promise to defend its insured from suits, a breach occurs when the insurer refuses to defend an action brought against its insured. *Schimmer v Wolverine Ins Co*, 54 Mich App 291, 297; 220 NW2d 772 (1974). With respect to a promise to indemnify, the period of limitations runs from "when the indemnitee sustained the loss," *Ins Co of North America v Southeastern Electric Co, Inc*, 405 Mich 554, 557; 275 NW2d 255 (1979), or "when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995).

As we have already noted, all events giving rise to defendant's alleged duties of performance with respect

to defending plaintiff against environmental "suits" or indemnifying plaintiff for property damage claims plaintiff became legally obligated to pay, except in one instance, occurred more than six years before this lawsuit was filed in June 2003. With respect to environmental claims, defendant's obligation to defend plaintiff would have arisen upon plaintiff's receipt of the complaint in a lawsuit seeking money for property damage or upon receipt of a governmental agency PRP letter. See *Michigan Millers*, *supra* at 573-575, and *South Macomb Disposal Auth*, *supra* at 668. Plaintiff became legally obligated for cleanup costs giving rise to plaintiff's claim for indemnity when it entered various third-party private settlements and stipulations or consent orders with various governmental agencies. Plaintiff entered one consent order within the six-year period immediately preceding the filing of this lawsuit. Specifically, plaintiff entered a consent order on February 5, 1998, with the Arkansas Department of Pollution Control and Ecology for remedial response at the Finch Road landfill. But to the extent that plaintiff's claim is based on this consent order, recovery against defendant is precluded by the policies' notice condition precedent as discussed in part III (A) of this opinion, or breach of the "voluntary payments" and "no action" conditions precedent, hereafter discussed in part III (C) of this opinion.

Plaintiff asserts two arguments regarding the statute of limitations that, though logical and having some caselaw support, we reject under the facts and circumstances of this case. First, plaintiff argues that the period of limitations did not begin to run until defendant formally denied coverage, which occurred after this lawsuit was filed. Plaintiff relies on *Schimmer*, *supra* at 297, which states that a cause of action for breach of the duty to defend accrues "when [the in-

surer] refused to defend the actions brought against [the] plaintiff." Although this statement is dictum, it does appear to be the general rule. Plaintiff also relies on *Jacobs v Detroit Automobile Inter-Ins Exch*, 107 Mich App 424; 309 NW2d 627 (1981), but that case is factually distinguishable in that it was based on policy language "that a demand for arbitration of a claim for uninsured motorist benefits was a condition precedent to plaintiff's right to suit." *Id*. at 431.

Plaintiff's argument that the period of limitations did not begin to run until defendant formally denied coverage fails. First, plaintiff's complaint alleges that the breach of contract had already occurred at some point before the filing of the complaint. Paragraph 37 of the complaint alleges that defendant "denied coverage, reserved the right to refuse coverage, or otherwise failed or refused to comply with its contractual duties and obligations . . . ." Further, plaintiff began incurring the expenses for which it now seeks indemnification in 1985 and notified defendant that it had incurred some of those expenses in letters dated October 3, 1985, and April 17, 1986. The first letter specifically advised that plaintiff would be making a claim against defendant for the cleanup expenses it was incurring. Defendant's November 1, 1985, response to the October 3, 1985, letter at most promised to investigate coverage while reserving its rights under the policy. It does not appear that defendant responded to the second letter, which was referenced: "Claim Concerning Cozad Groundwater Contamination." The last correspondence between the parties before the instant lawsuit was filed occurred in February 1993. Plaintiff forwarded to defendant a letter enclosing "status reports" regarding its "significant environmental claims" concerning all five sites at issue. Defendant responded on February 24, 1993, that it could not match the material presented in plaintiff's

letter to any prior claim and requested further information. Thus, by 1993, although plaintiff had asserted claims for indemnity regarding all five sites, defendant gave no indication that it would honor the claims. We conclude that the period of limitations began to run notwithstanding the lack of a formal denial by defendant. Indeed, at the very latest, the period of limitations began to run on a claim for indemnity when plaintiff became legally obligated for cleanup costs after it entered into settlements with private third parties and stipulations or consent orders with various governmental agencies.

With respect to plaintiff's claim for breach of defendant's duty to defend "suits" brought against plaintiff, defendant never refused to do so because it was never informed of any suits and because plaintiff never requested a defense. The policies themselves set forth that defendant has both a duty and the right to defend any suit for covered damages brought against plaintiff. Further, the policies require plaintiff to immediately notify defendant of such suits, which plaintiff did not do. For the reasons discussed in part III (A) of this opinion, defendant suffered prejudice from plaintiff's breach of the notice-of-suit condition. For the same reasons, plaintiff's inexcusable delay in bringing suit regarding the asserted duty to defend has prejudiced defendant. Further, plaintiff's breach of the notice condition combined with an inexcusable delay of longer than the statutory limitations period in filing suit created the "exceptional circumstances" or "compelling equities" for laches to bar this claim. *Eberhard, supra* at 35-36.

Finally, we reject plaintiff's argument that the policies' "no action" condition precedent has not yet been fulfilled and, therefore, the period of limitations could

not run. Not only must the policies be read as a whole but also so must the "no action" clause. A paragraph of a contract "must be read as a whole and together with the remaining provisions of the [contract], and not by disassociating one part thereof from the remainder." *Fox v Detroit Trust Co*, 285 Mich 669, 676; 281 NW 399 (1938). We do not read the "no action" condition as a temporal requirement for suit, i.e., a contractual statute of limitations. The "no action" condition provides:

> No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the **insured's** obligation to pay shall have been finally determined either by judgment against the **insured** after actual trial or by written agreement of the **insured**, the claimant and the company. [Emphasis in original.]

Although the first four words of this paragraph might possibly be read as referring to when a suit could be filed, the clause when read as a whole is a condition precedent to the insurer's liability, not a time frame within which the insured may file suit. See *Wood*, *supra* at 163-164, and *Coil Anodizers, Inc v Wolverine Ins Co*, 120 Mich App 118, 121-123; 327 NW2d 416 (1982).

In sum, plaintiff's claims are time-barred either by the statute of limitations or by laches.

C. VOLUNTARY PAYMENTS AND SETTLEMENTS

Independent of the lack of notice and the untimely filing of plaintiff's complaint, we agree with defendant that plaintiff voluntarily and without defendant's approval entered into various consent decrees and incurred extensive costs to remediate environmental contamination at the five sites. Because plaintiff voluntarily entered into various consent decrees and settlements without defendant's consent, the "volun-

tary payments" and the "no action" clauses in the policies at issue preclude defendant's liability under the policies. *Coil Anodizers, supra* at 123; *Wood*, *supra* at 163-164; see also *Augat, Inc v Liberty Mut Ins Co*, 410 Mass 117, 122-123; 571 NE2d 357 (1991) (consent order that the insured entered into with the government for environment cleanup was "voluntary" and the insurer was not required to demonstrate prejudice before being allowed to disclaim liability under the "voluntary payments" clause).

Plaintiff argues that it did not violate the "voluntary payments" and the "no action" clauses because (1) its responses to governmental cleanup demands were not "voluntary"; (2) defendant waived its right to complain regarding plaintiff's actions by not promptly participating in a response, and (3) defendant has failed to demonstrate that it was prejudiced by plaintiff's actions. We disagree.

Plaintiff's responses to governmental cleanup demands were "voluntary" because plaintiff had other choices. In *Michigan Millers, supra* at 572-574, our Supreme Court discussed factors that differentiated a common civil liability demand from the PRP letter the EPA sent to Michigan Millers' insured. The Court held, "Taking into account the various components of this PRP letter and its ramifications, we find that the legal proceeding initiated by the receipt of that notice is the functional equivalent of a suit brought in a court of law." *Id*. at 573. The Court noted that the administrative record created after the PRP letter would be critical, that CERCLA essentially imposed strict liability, that the PRP letter carried immediate and severe implications, including that the EPA could take whatever action it deemed necessary, subject only to later review for an abuse of discretion. *Id*. at 573-574. The Court opined:

> The EPA's powers may also be viewed as coercing the "voluntary" participation of PRPs. The entire CERCLA scheme revolves around "encouraging" PRPs to engage in voluntary cleanups. Only in so doing may a PRP have a voice in developing the record that will be used against it and in determining the amount of its liability through selection of investigatory and remedial methods and procedures. The significance of these incentives is underscored by the fact that EPA-conducted CERCLA actions have historically been considerably and, some would suggest, needlessly more expensive than those actions conducted by PRP groups. [*Id.* at 574-575.]

Plaintiff relies on the passage above to argue that its responses to governmental cleanup demands were not voluntary. Clearly, coerced action cannot be voluntary. Read in context of the Court's opinion, however, the quoted comment does not mean voluntary cooperation with the government after receiving a PRP letter is involuntary. Rather, in context, the quoted comment must mean that when faced with the harsh reality of potentially worse alternatives under the CERCLA, cooperation with the government is the wisest choice.

Defendant cites *Augat*, *supra* at 122-123, which holds that the insured voluntarily consented to an order with the government for environmental cleanup. In *Augat*, the insured's manufacturing plant discharged contaminated wastewater into a municipal sewer system. The Massachusetts Department of Environmental Quality Engineering (DEQE) drafted a complaint against Augat seeking damages, injunctive relief, and civil penalties under Massachusetts's law. The complaint was simultaneously filed with a consent order signed by Augat and the commonwealth and a proposed judgment, which judgment was entered four days later. The judgment imposed civil penalties and required that Augat decontaminate the site at its own expense. *Id.* at 118-119. Although Augat wrote to Liberty Mutual a

week after the entry of the consent order advising that " '[a] situation has arisen . . . which may give rise to a claim' " under the comprehensive general liability policy covering the plant, Augat did not advise Liberty Mutual of the consent order until almost 2½ years later. *Id*. at 119. Subsequently, Augat submitted a claim for several million dollars for past and future remediation expenses, which Liberty Mutual denied. *Id*. Augat sued Liberty Mutual for breach of contract and other claims. *Id*. Liberty Mutual moved for summary disposition on the basis of the policy's "voluntary payment" clause, which is identical to that at issue in the present case and provides, in part, " 'The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.' " *Id*. at 119 n 3.

Augat argued in opposition that "it did not violate the voluntary payment provision because its consent to judgment was not 'voluntary,' but was coerced by the threat of a more costly verdict." *Id*. at 120. The court addressed this argument as follows:

> The question then becomes whether, by entering into a consent judgment, Augat "voluntarily" assumed the obligation to fund the cleanup, thus releasing Liberty Mutual from the duty to indemnify under the voluntary payment provision of the policy. We conclude that the assumption of the obligation was "voluntary" for present purposes. Here, as Augat urges, we give a seemingly unambiguous term of the insurance policy its common, ordinary meaning. Webster's defines "voluntary" variously as "by an act of choice," "not constrained, impelled, or influenced by another," "acting or done of one's own free will," and adds that the word "implies freedom from any compulsion that could constrain one's choice." Webster's Third New International Dictionary 2564 (1961). Augat suggests that, under this definition, its settlement with the DEQE was

> not "voluntary" because the company did not *want* to assume the considerable expense of cleaning up the site of the spill. Instead, according to Augat, the company was presented with a "Hobson's choice": it could accept the settlement DEQE offered or risk paying treble damages following a suit. We conclude that the decision was "voluntary," however, because Augat had an alternative—it had the right to demand that Liberty Mutual defend the claim and assume the obligation to pay for the cleanup. Nevertheless, Augat failed to exercise this right. Thus, while Augat's decision obviously was not "voluntary" in the sense of "spontaneous" or entirely free from outside influence, it was "voluntary" in the sense of "by an act of choice." Therefore, we conclude that the voluntary payment clause, if applied literally, would remove the cleanup costs from the scope of coverage under the policy. [*Augat*, *supra* at 121-122 (citations omitted; emphasis in original).]

The United States District Court for the Eastern District of Michigan in *Aetna Casualty*, *supra* at 813, applying Michigan law in a similar pollution case addressing insurance coverage, addressed the question whether Dow Chemical's responses to governmental demands were "voluntary" within the meaning of the same general liability policy condition. The district court, using reasoning similar to that in *Augat*, also concluded that Dow Chemical had made "voluntary payments." Dow had argued that it had a legal obligation that left it with no choice but to respond as it did. *Id*. at 831. The court rejected this argument, opining "that the insured has other options under circumstances such as those presented here; i.e., the option to demand that its insurers participate in the matter for which it seeks coverage or the option to at least notify its insurers in advance of taking actions for which it later seeks indemnification." *Id*. at 832.

Although neither *Augat* nor *Aetna Casualty* is binding precedent, the reasoning they employ regarding the

meaning of the "voluntary payment" clause is persuasive. Both courts applied principles of construction Michigan courts would employ when interpreting identical language in a general liability policy in a strikingly similar factual setting. Michigan courts also "examine the language in the contract, giving it its ordinary and plain meaning," *Wilkie*, *supra* at 47, and may resort to a dictionary such as *Webster's* to establish the meaning of a term, *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). Further, Michigan courts will enforce clear and unambiguous exclusions in insurance policies unless contrary to Michigan law or policy. See *Linebaugh v Farm Bureau Mut Ins Co*, 224 Mich App 494, 503-505; 569 NW2d 648 (1997), and *Lee v Auto-Owners Ins Co (On Second Remand)*, 218 Mich App 672, 676; 554 NW2d 610 (1996).

In the present case, as in *Augat*, plaintiff failed to notify defendant of both third-party claims and governmental environmental cleanup demands that under Michigan law were the equivalent of a lawsuit that would trigger an insurer's duty to defend the insured. Consequently, plaintiff had choices regarding how to respond to the receipt of governmental PRP letters, including demanding that defendant provide a defense. *Augat*, *supra* at 121-122. The insurer's duty to defend its insured under a general liability policy is broader than the duty to indemnify. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 450; 550 NW2d 475 (1996). "If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense." *Id*. at 450-451. Consequently, plaintiff voluntarily made payments, assumed obligations, and incurred expenses within the meaning of the "voluntary payments" clause in the policies. Unless the clause is contrary to public policy, or defendant waived its application, plaintiff's

breach of this condition precedent relieved defendant of liability. *Coil Anodizers*, *supra* at 121-123; *Lee, supra* at 676.

The closely related "no action" condition precedent is also pertinent. It is not disputed that plaintiff's obligation to remediate the pollution or pay settlements was not determined "by judgment against the insured after actual trial" or by a written agreement to which defendant was a party. Consequently, unless this condition precedent is contrary to public policy or defendant waived its application, plaintiff's breach has relieved defendant of liability.

Plaintiff argues that neither the "voluntary payment" nor the "no action" clause shields defendant from liability because defendant has not established that it was prejudiced. Although there is longstanding precedent requiring a showing of actual prejudice to void insurance coverage on the basis of the insured's failure to comply with contractual provisions requiring notice immediately or within a reasonable time, *Koski*, *supra* at 444, no such judicial requirement has been grafted onto the "voluntary payment" and "no action" clauses at issue here. To do so now would be contrary to settled principles of contract interpretation. While exclusionary clauses in insurance contracts are strictly construed in favor of the insured, clear and specific exclusions must be enforced as written. *Brown v Farm Bureau Gen Ins Co*, 273 Mich App 658, 661; 730 NW2d 518 (2007).

This Court has determined the "voluntary payment" and "no action" clauses here at issue to be clear and unambiguous and has enforced them as written without a showing of prejudice. In *Coil Anodizers*, the plaintiff allegedly produced defective anodized aluminum sheets that yellowed on exposure to sunlight. Coil's customer

(Prime) notified Coil that it would look to Coil to reimburse any expenses it might incur to its own customer (Avion). Coil notified Wolverine, its liability insurer, but Wolverine denied coverage and refused to defend Coil. Although no lawsuit was ever filed, Coil settled the claim. *Coil Anodizers*, *supra* at 120. Wolverine's policy, like the ones in this case, provided that the insurer would pay all sums that the insured shall become legally obligated to pay for covered damages and contained the identical "voluntary payment" and "no action" clauses. *Id*. at 120-121. This Court found the clauses to be unambiguous conditions of Wolverine's liability, opining:

> The language of the contract's "no action" clause clearly contemplates that the insured's liability to the claimant shall first be fixed by formal judgment or be formally acquiesced in by defendant as a condition precedent to recovery. Neither a judgment nor formal consent . . . was obtained here. Accordingly, plaintiff's settlement . . . effectively excused defendant from liability. [*Id.* at 123.]

At least one subsequent panel of this Court has read *Coil Anodizers* as holding that an insurer need not show prejudice to enforce "voluntary payment" and "no action" clauses.[6] Further, in *Giffels v Home Ins Co*, 19 Mich App 146; 172 NW2d 540 (1969), on which the *Coil* Court relied in part, a showing of actual prejudice was not required before the insured's voluntary settlement relieved the insurer of liability. In *Giffels*, the insurance policy conditioned payment upon a prior determination that the insured be found legally liable and also reserved to the insurer the right to adjust the claim and to conduct and control the defense of the insured. *Id*. at 152. The Court held that under the terms of the policy

[6] *Dupuis v Utica Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2006 (Docket No. 250766).

and an express cautionary instruction by the insurer, the insured was not entitled to settle the claim without the consent of the insurer. *Id*. The Court further held that the plaintiff by his unauthorized settlement with the claimant, "improperly denied [the insurer] the right to effect an adjustment of the claim or to conduct a defense," thereby releasing the defendants from liability. *Id*. at 153. The *Giffels* Court found no need for the insurer to show actual prejudice.

Similarly, the *Augat* court rejected the insured's argument that the insurer be required to show actual prejudice from the insured's breach of the "voluntary payments" clause to relieve the insurer of liability. The court explained that "the purpose of the policy provision in question is to give the insurer an opportunity to protect its interests." *Augat*, *supra* at 123. The court stated:

> After Augat agreed to a settlement, entered into a consent judgment, assumed the obligation to pay the entire cost of the cleanup, and in fact paid a portion of that cost, it was too late for the insurer to act to protect its interests. There was nothing left for the insurer to do but issue a check. We conclude, therefore, that no showing of prejudice is required in this case . . . . [*Id*.]

The *Augat* court's reasoning applies to the present case. See also *Wood*, *supra* at 163-164.

Plaintiff cites several federal court decisions to the contrary, including *Aetna Cas*, *supra* at 833-834, in which the court predicted that the Michigan Supreme Court would apply a prejudice requirement to the "voluntary payment" and "no action" conditions similar to that with respect to "notice" of occurrence or suit conditions. In general, these federal decisions are either factually distinguishable or are simply not persuasive given this Court's decision in *Coil Anodizers*. Further,

this Court explicitly rejected a prejudice requirement with respect to an analogous requirement in an uninsured motorist insurance provision that an insured not settle a claim against a third-party tortfeasor without the consent of the insurer. See *Lee*, *supra* at 676 (clear and specific exclusions contained in policy language must be given effect without incorporating a condition of prejudice), and *Linebaugh*, *supra* at 506-507 (concluding that the plaintiff's "conduct clearly violated the exclusion providing that coverage did not apply to any claim settled without the insurer's consent [and] neither 'lack of prejudice' nor 'lack of reasonableness' " was a sufficient ground for ignoring clear policy language). Consequently, we conclude that the clear and unambiguous "voluntary payment" and the "no action" conditions must be enforced as written without requiring the insurer to prove actual prejudice to its rights.

Finally, plaintiff argues that defendant waived the application of both the "voluntary payment" and the "no action" conditions. We reject this argument for the same reason this Court rejected a similar one in *Coil Anodizers*. The Court held that Wolverine did not waive the "no action" clause by refusing to defend Coil Anodizers because "an insured must show that the insurer both denied liability *and* refused to defend an *action* brought against the insured." *Coil Anodizers, supra* at 124 (emphasis in original). No waiver occurred because no lawsuit was ever filed. *Id*. Similarly, here, defendant was not notified of any third-party suits or governmental PRP demands, nor did plaintiff request that defendant defend it from any such claims or suits. Consequently, defendant could not have waived either the "voluntary payment" or the "no action" conditions. Moreover, " '[a] waiver is a voluntary relinquishment of a known right.' " *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008), quoting *Dahrooge*

v Rochester German Ins Co, 177 Mich 442, 452-452; 143 NW 608 (1913). No waiver occurred here.

D. CONCLUSION

Because of our resolution of the issues discussed in parts III (A), (B), and (C), it is unnecessary for this Court to address the issues raised in plaintiff's cross-appeal. Plaintiff's cross-appeal is moot in light of our resolution of defendant's issues. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. *Michigan Nat'l Bank, supra* at 21.

We conclude that the undisputed facts established that plaintiff failed to provide defendant any notice of governmental environmental cleanup demands (PRP letters), the functional equivalent of a lawsuit, or of any private third-party claims or demands. Plaintiff's failure to give notice of suit deprived defendant of the opportunity to promptly contest its liability to the insured, participate in settlement negotiations, or contest plaintiff's liability. Prejudice to defendant is clear because plaintiff waited years after its liability had been cemented by its own settlements, stipulations, and consent decrees before seeking insurance payments. The trial court erred by not granting defendant summary disposition on this issue.

Independently, we find that plaintiff's lawsuit is time-barred by the statute of limitations, or under the equitable doctrine of laches.

Again, independently of the first two reasons, plaintiff "voluntarily" entered third-party settlements, stipulations, and consent decrees with governmental agencies to take remedial action regarding environmental damages. The clear and unambiguous "voluntary payment" and the "no action" conditions precedent preclude defendant's liability with no requirement that

defendant prove actual prejudice to its rights. Consequently, the trial court erred by not granting defendant summary disposition on this basis also.

We reverse and remand for entry of judgment for defendant. We do not retain jurisdiction.

SLAUGHTER v BLARNEY CASTLE OIL COMPANY

Docket No. 283266. Submitted October 14, 2008, at Lansing. Decided November 6, 2008, at 9:00 a.m. Leave to appeal sought.

Judy Slaughter brought a premises-liability action in the Manistee Circuit Court against Blarney Castle Oil Company after she slipped and fell on black ice at the defendant's gas station while the plaintiff and her husband were there to refuel her truck. The court, James M. Batzer, J., denied motions for summary disposition by the defendant, which had argued that black ice, by itself, is an open and obvious danger in Michigan during winter. The defendant appealed.

The Court of Appeals *held*:

A premises possessor owes a duty to undertake reasonable efforts to make its premises reasonably safe for its invitees. A premises possessor is generally not required to protect its invitees from open and obvious dangers. The standard for determining if a condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. Black ice, defined as an invisible or nearly invisible coating of ice on a paved surface, is not an open and obvious danger where it is not visible upon casual inspection or is without other indicia of a potentially hazardous condition. In this case, there remains a question of fact regarding whether an average person of ordinary intelligence would have been able upon casual inspection to discover the danger and risk posed by the black ice.

Affirmed.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — BLACK ICE.

A premises possessor is generally not required to protect an invitee from open and obvious dangers; black ice, an invisible or nearly invisible coating of ice on a paved surface, if it is not visible upon casual inspection or if it is without other indicia of a potentially hazardous condition, is not an open and obvious danger.

Morrissey, Bove & Ebbott, P.C. (by *Christopher J. Ebbott*), for the plaintiff.

Warner Norcross & Judd LLP (by *F. William McKee* and *Sarah Riley Howard*) for the defendant.

Before: BECKERING, P.J., and BORRELLO and DAVIS, JJ.

BECKERING, P.J. In this premises liability action, defendant appeals by leave granted the trial court's order denying its motion for summary disposition, limited to the issue whether black ice without the presence of snow is an open and obvious danger. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. PERTINENT FACTS

Plaintiff injured her back when she slipped and fell while an invitee at defendant gas station. Plaintiff alleges that on December 31, 2004, she and her husband traveled from Linden, Michigan, to Manistee, Michigan, in order to visit a casino and attend a theatrical performance. The weather was sunny during their drive north that morning. It did not snow that day, nor at any time during the prior week. When plaintiff and her husband headed to the show in the evening, the weather in Manistee was cloudy.

After the show, at some time between midnight and one o'clock in the morning, plaintiff and her husband stopped at the defendant gas station to refill their gas tank in preparation for the return trip. Plaintiff needed to use the restroom, and fell while alighting from her truck. Holding onto the door of the vehicle, plaintiff had placed her right foot on the running board, swung out, and stepped onto the pavement with her left foot. She had immediately lost her footing on black ice and slid underneath the truck. The parking lot was paved with black asphalt, and plaintiff was not able to observe ice

or snow. It was, however, starting to rain at the time of her fall. Plaintiff told the gas station attendant she had fallen and advised him to salt the parking lot to make it less slippery.

Plaintiff filed suit, and defendant filed two motions for summary disposition in the trial court; one filed before answering the complaint and the other filed upon the completion of discovery.[1] At the first motion, the trial court questioned defendant's attempt to further extend the open and obvious danger doctrine to black ice—something that, by its nature and without other indicators, is not open and obvious. Addressing the principle behind the open and obvious danger doctrine, the court commented, "[I]t seems to me that what sets so-called black ice apart in its capacity to be treacherous is that it's not visible. It's a fairly invisible kind of ice. And so people get tripped up on it, as it were."

Defendant argued that black ice should be considered open and obvious by the mere fact that any prudent Michigan resident knows that in winter months in Michigan, there is ice and snow on the ground. The trial court agreed with the general principle that obvious weather conditions should fall within the open and obvious danger doctrine, but took issue with the idea that the doctrine should apply to conditions that are, in fact, invisible, stating: "Well, sure. I agree. Except what if you look and you can't see it? Does that mean you don't dare walk? You don't dare get out of a car? You just got to stand there? Or should we all carry ski poles with spikes in them? Crampons on our boots? What do we do? What do we do if we look and can't see it? That's my question." The judge denied the motion and ordered

[1] Both motions were brought under MCR 2.116(C)(10).

that discovery be taken to ascertain whether, under the circumstances of the case, the condition was open and obvious.

After the completion of discovery, defendant renewed its motion for summary disposition. The trial court denied the motion, holding that given the circumstances, there was a question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection. Defendant appeals by leave granted.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Issues of law are also reviewed de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 164; 645 NW2d 643 (2002).

III. DUTY OF CARE AND THE OPEN AND OBVIOUS DANGER DOCTRINE

It is well settled in Michigan that a premises possessor owes a duty "to undertake reasonable efforts to make its premises reasonably safe for its invitees." *Lugo v Ameritech Corp*, *Inc,* 464 Mich 512, 526; 629 NW2d 384 (2001). As such, a premises possessor "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm

caused by a dangerous condition on the land." *Id.* at 516, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

A premises possessor is generally not required to protect an invitee from open and obvious dangers.[2] The logic behind the open and obvious danger doctrine is that "an obvious danger is no danger to a reasonably careful person." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993). Accordingly, when the potentially dangerous condition "is wholly revealed by casual observation, the duty to warn serves no purpose." *Id.* If this purpose is frustrated by the application of the doctrine to a particular set of facts because the condition is for all practical purposes invisible and indiscernible, then the application of the open and obvious danger doctrine would not be appropriate.

"[I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, *supra* at 517. The special aspects that cause even open and obvious conditions to be actionable are those that make the conditions "effectively unavoidable," or those that "impose an unreasonably high risk of severe harm." *Id.* at 518.

The standard for determining if a condition is open and obvious is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection."

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[2] The rationale behind imposing a duty upon the premises possessor for hidden or latent defects is that the burden "should rest upon the one who is in control or possession of the premises and, thus, is best able to prevent the injury." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 91; 485 NW2d 676 (1992).

Novotney, supra at 475. The test is objective, and the inquiry is whether a reasonable person in the plaintiff's position would have foreseen the danger, not whether the particular plaintiff knew or should have known that the condition was hazardous. *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 5; 649 NW2d 392 (2002).

When applying the open and obvious danger doctrine to conditions involving the natural accumulation of ice and snow, our courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months. In *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002), this Court determined that the danger posed by a visibly snowy and icy sidewalk, on which plaintiff slipped twice before falling and recognized as being unsafe, was open and obvious. In *Corey*, *supra* at 2, 5-6, this Court held that a reasonable person would recognize the danger posed by visibly snowy and icy steps outside a college dormitory and that the condition therefore was open and obvious.

In *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 101-102, 119 (GRIFFIN, J., dissenting); 689 NW2d 737 (2004) (*Kenny I*), rev'd 472 Mich 929 (2005) (*Kenny II*), a 78-year old lifelong Michigan resident slipped and fell in a parking lot in December. She did so after witnessing three companions get out of a vehicle in the parking lot and hold onto the hood of the car to keep their balance. *Id*. In his dissent, Judge GRIFFIN opined that under those circumstances, "all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery." *Id*. at 120. Judge GRIFFIN adopted the reasons articulated by the trial court, which noted

that a lifelong Michigan resident should be aware that ice frequently forms beneath the snow during snowy December nights. *Id*. at 119. Our Supreme Court subsequently adopted Judge GRIFFIN's dissenting opinion. *Kenny II*, *supra*.

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006), this Court was faced with determining whether the Supreme Court in *Kenny II* was adopting one of two possible rules:

> First, a snow-covered surface might always, by its very nature, present an open and obvious danger because it is likely to be slippery as a result of underlying ice or for some other reason. Alternatively, a snow-covered surface would not present an open and obvious danger unless there is some other reason, in the facts of a particular case, that would lead a plaintiff to reasonably conclude that it is slippery.

In *Ververis*, "there was no independent factor, beyond the snowy surface itself, that would reasonably have alerted [the plaintiff] to the fact that it was slippery." *Id.* at 66. In determining which rule applies, this Court considered the fact that the Supreme Court summarily reversed three other cases that had relied on *Kenny I* in determining that snow-covered ice did not constitute an open and obvious danger; *Schultz v Henry Ford Health Sys*, 474 Mich 948 (2005), *Morgan v Laroy*, 474 Mich 917 (2005) (*Morgan II*), and *D'Agostini v Clinton Grove Condominium Ass'n*, 474 Mich 876 (2005). "The Supreme Court reinstated the trial court decisions that the defendants were entitled to summary disposition on the open and obvious danger question even though there were no factors in those cases, other than the snow-covered surfaces themselves, that would have forewarned the plaintiffs regarding their slipperiness." *Ververis, supra* at 66-67. Thus, on the basis of those rulings, this Court held "as a matter of law that, by its very nature, a snow-covered

surface presents an open and obvious danger because of the high probability that it may be slippery." *Id*. at 67.

The open and obvious danger doctrine was also applied to black ice in a snow-covered parking lot in *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007), a case in which the plaintiff stepped off a sidewalk into a parking lot, slipped on snow-covered black ice, and slid underneath her car. The plaintiff had observed that the pavement was snow-covered, but did not otherwise realize that the surface was slippery. *Id*. at 390, 394.

With regard to ice-covered surfaces without the presence of snow, the Supreme Court has held that the danger posed by visible frost and ice is open and obvious. *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11, 14; 643 NW2d 212 (2002). In *Perkoviq*, the plaintiff, a painter, fell from the roof of a partially constructed house after he had told the defendant that the roof was icy. *Id*. at 12, 14.

Thus, absent special circumstances, Michigan courts have generally held that the hazards presented by snow, snow-covered ice, and observable ice are open and obvious and do not impose a duty on the premises possessor to warn of or remove the hazard.[3] There is no published opinion, however, that addresses whether black ice, without the presence of snow, is considered an open and obvious danger in and of itself.

IV. ANALYSIS

Defendant argues that the "vast weight of published and unpublished cases from this Court and our Su-

[3] If special circumstances exist, "the premises possessor has a duty to take reasonable measures to protect invitees from that risk." *Royce, supra* at 392, citing *Lugo, supra* at 517.

preme Court strongly suggest that the reasonable Michigan resident should know of the potential hazardous weather conditions in parking lots in the winter, regardless of the presence of snow or not."[4] Thus, defendant contends, the mere presence of black ice in Michigan at any time during the winter should be deemed open and obvious as a matter of law.

Plaintiff contends that under the circumstances of this case, she had no warning of icy conditions on defendant's premises and that, the condition therefore was not open and obvious. Further, plaintiff contends that special circumstances existed because the condition posed an unreasonable risk and was unavoidable.

To determine whether black ice is open and obvious, one must consider the logic behind the open and obvious danger doctrine, which, as stated earlier, is that "an obvious danger is no danger to a reasonably careful person." *Novotney, supra* at 474. We are asked to determine whether "an average user with ordinary intelligence" would be able to discover black ice "upon casual inspection," absent the presence of snow. *Id.* at 475.

Perhaps the best way to ascertain whether black ice is open and obvious is to examine the characteristics of black ice. Webster's New World College Dictionary (4th ed), p 151, describes black ice as "a thin, nearly invisible layer of ice on a paved road." Merriam-Webster's Collegiate Dictionary (11th ed), p 129, defines black ice as "a nearly transparent film of ice on a dark surface (as a paved road or a body of water) that is difficult to see." The American Heritage Dictionary of the English Language (4th ed), p 191, defines black ice as "[a] thin, nearly invisible coating of ice that forms on paved

[4] Unpublished opinions have varied in their analysis of this issue, and they are not binding precedent of this Court. MCR 7.215(C)(1).

surfaces." The New Oxford American Dictionary (2nd ed), p 172, describes it as "a transparent coating of ice, found esp. on a road or other paved surface." The American Century Dictionary (2005), p 60, defines it as a "thin layer of invisible ice on a road, etc."

The overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent. Such definition is inherently inconsistent with the open and obvious danger doctrine. Consequently, we decline to extend the doctrine to black ice without evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition.

With regard to whether other evidence of an open and obvious danger existed in this case, there was no snow on the ground, and it had not snowed in a week. Before alighting from her truck, plaintiff did not observe anyone else slip or hold onto an object to maintain his or her balance. She did not see the ice before she fell, and could not readily see it afterwards. Although it was starting to rain at the time of plaintiff's fall, the danger and risk presented by a wet surface is not the same as that presented by an icy surface. Contrary to defendant's assertion that the mere fact of it being wintertime in northern Michigan should be enough to render any weather-related situation open and obvious, reasonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day. As such, the circumstances and specific weather conditions present at the time of plaintiff's fall are relevant. We are not persuaded that the recent onset of rain wholly revealed the condition and

its danger as a matter of law such that a warning would have served no purpose. See *Novotney*, *supra* at 474.

We agree with the trial court that there remains a question of fact regarding whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection, and affirm the denial of summary disposition in this matter. Given our ruling, we need not address plaintiff's alternative argument that special circumstances existed.

Affirmed.

MANIER v MIC GENERAL INSURANCE CORPORATION

Docket No. 279586. Submitted November 4, 2008, at Detroit. Decided November 13, 2008, at 9:00 a.m.

Terry D. Manier and minors James A. Manier, Shaniqua J. Hughes, and William D. Manier, through their next friend, Terry D. Manier, brought an action in the Washtenaw Circuit Court against no-fault insurer MIC General Insurance Corporation. The plaintiffs sought first-party no-fault benefits for injuries sustained by the minors in an automobile accident and a declaration that the defendant had improperly reformed the insurance policy covering Terry Manier and the Oldsmobile in which the minors were passengers at the time of the accident. The defendant's policy had been issued to Manier's parents, Alice and Clarence Burton, listed Terry Manier as driver of the Oldsmobile, and included a household exclusion that limited benefits for bodily injury sustained by the insureds and members of their family to the minimum limits required by the financial responsibility laws of Michigan. After the accident, upon learning that Terry Manier did not reside with his parents and kept the Oldsmobile at his residence, the defendant had reformed the policy only to correct Terry Manier's address. The defendant had also paid first-party no-fault benefits for the minors. The court, Melinda Morris, J., granted summary disposition for the defendant, ruling that Alice Burton had misrepresented Terry Manier's address to the defendant and declaring that the statutory minimum of $20,000 a person and $40,000 each accident was the limit for claims by family members, as specified in the household exclusion. The plaintiffs appealed.

The Court of Appeals *held*:

1. The circuit court correctly determined that Alice Burton's misrepresentation concerning Terry Manier's residence entitled the defendant to reform the policy. When fraud is used by an insurer as a defense, the critical issue is whether the fraud could have been ascertained early by the insurer at the time the contract of insurance was entered into. An insurer does not owe a duty to an insured to investigate or verify a policy applicant's representations or to discover intentional material misrepresentations. Alice Burton told the defendant that Terry Manier resided in her home,

and the defendant could not have easily ascertained Alice Burton's misrepresentations at the time she made them.

2. The defendant did not unlawfully reform the policy. Reformation or rescission may occur if fraud or a material misrepresentation occurred, the insurance coverage was considered optional, and the fraud could not have been ascertained easily by the insurer. Although an insurer is estopped from asserting fraud to rescind coverage applicable to an innocent third party, an insurer is not precluded from rescinding the policy to void any optional insurance coverage. Optional coverage includes any lawful coverage in excess of or in addition to mandatory minimum coverage specified for a motor-vehicle liability policy. In this case, the defendant, in reforming the policy, did not alter the original liability coverage limit.

3. The household exclusion in this case limits liability coverage to the minimum provided in MCL 257.520(b)(2) and thus complies with the minimum coverage requirement of the financial responsibility act, MCL 257.501 *et seq*.

Affirmed.

Darnell & Lulgjuraj, P.C. (by *Nik Lulgjuraj*), for the plaintiffs.

Harvey Kruse, P.C. (by *Michael F. Schmidt*), for the defendant.

Before: GLEICHER, P.J., and KELLY and MURRAY, JJ.

PER CURIAM. In this insurance coverage dispute, plaintiffs appeal as of right the circuit court's order granting summary disposition in favor of defendant. We affirm.

On July 8, 2005, Terry Manier's two children and minor ward sustained injuries in a motor vehicle crash. The children were in a 2001 Oldsmobile Silhouette owned by Manier and Alice Burton, his mother, and driven by Manier's girlfriend. Several months before the accident, defendant issued Alice and Clarence Burton, Manier's parents, a no-fault automobile insurance

policy that covered the Silhouette and several other vehicles. The insurance policy listed Manier as a driver of the Silhouette.

After the accident, defendant determined that the Burtons' application for no-fault insurance coverage of the Silhouette had misrepresented that Manier lived with the Burtons in their Westland home, and that the vehicle would be stored in Westland. Manier, his girlfriend, and the children actually lived in Ypsilanti and kept the vehicle there. Despite this misrepresentation, defendant paid all first-party no-fault personal protection insurance benefit (PIP) claims submitted on behalf of Manier's children and ward. On October 11, 2005, defendant reformed the policy retroactive to March 12, 2005. The reformation corrected Manier's address, but made no other substantive changes. The reformed policy maintained the insurance coverage limits stated in the original policy, $100,000 a person, with a $300,000 limit for a single accident. Both the original and the reformed policies contained identical household exclusions restricting liability coverage: "*Bodily injury* to *you* or a *family member*. This exclusion applies only to damages in excess of the minimum limits required by the Financial Responsibility Laws of the state of Michigan." (Emphasis in original.)

On July 5, 2006, Manier sued defendant, seeking payment of first-party no-fault benefits and a declaration that defendant had improperly reformed the insurance policy by reducing the liability coverage. Manier's complaint asserted that he had made no misrepresentations, and that "[d]efendant knew, should have known or easily could have known that the Plaintiff, TERRY D. MANIER, resided in Ypsilanti."

On March 9, 2007, defendant filed a motion seeking summary disposition under MCR 2.116(C)(10), alleging

that it had paid all first-party no-fault benefit claims arising from the accident and that the reformed policy included the same liability coverage as the original policy. Manier responded that defendant could not reform the policy because the children qualified as "innocent third parties" and that the household exclusion could not apply in Michigan. In support of Manier's claim regarding the misrepresentation, he submitted the Michigan vehicle registration for the Silhouette, which reflected his Ypsilanti address, and an affidavit stating that "some time in March of 2005, someone from the Defendant called me to confirm information and I told that person that I lived in Ypsilanti."

At a summary disposition hearing conducted on May 2, 2007, Manier's counsel conceded that defendant had paid the children's first-party no-fault benefits, and the circuit court granted defendant summary disposition regarding that claim. Manier's counsel further admitted that Alice Burton had misrepresented the location of Manier's residence, but contended that defendant bore an obligation to independently investigate Manier's address. The circuit court found that Burton had misrepresented Manier's address, and granted summary disposition to defendant with respect to the liability coverage issue. In the final dismissal order entered on July 13, 2007, the circuit court ruled that "$20,000 per person/$40,000 per accident" constituted the maximum liability coverage available under the reformed policy for any claims made by a "family member."

Plaintiff raises several challenges to the circuit court's order of dismissal. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any

material fact and the moving party is entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, *supra* at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

Manier first challenges the circuit court's misrepresentation ruling, contending that regardless of any misstatements by Burton, defendant failed to dispute its awareness that Manier actually resided in Ypsilanti. Alternatively, Manier asserts that defendant easily could have ascertained his address by reviewing public records like his driver's license and the vehicle's registration. In support of these arguments, Manier cites *Farmers Ins Exch v Anderson*, 206 Mich App 214, 219; 520 NW2d 686 (1994). In *Farmers*, defendant Joyce Anderson's application for no-fault insurance coverage failed to disclose that her son, Jack Dillon, would be operating the subject vehicle. *Id*. at 216. Dillon's driver's license had been revoked, and he was ineligible for motor vehicle coverage. *Id*. After Dillon became involved in an accident that resulted in the death of another driver, Farmers claimed that Anderson had procured the policy by fraud and rescinded the policy. *Id*. at 215-216. This Court held that an insurance company may "use fraud as a defense to limit coverage under the policy to the statutory minimum." *Id*. at 221. However, this Court observed that a "validly imposed defense of fraud" will not "absolutely void any optional

excess insurance coverage in all cases," explaining that "when fraud is used as a defense in situations such as these, the critical issue necessarily becomes whether the fraud could have been ascertained easily by the insurer at the time the contract of insurance was entered into." *Id*. at 219. Given that Dillon's name did not appear in Anderson's application, this Court determined that "it would have been virtually impossible for Farmers to know that it should obtain Dillon's driving record, because it had no reason to believe that he would be operating the subject vehicle." *Id*. at 220.

In *Hammoud v Metropolitan Prop & Cas Ins Co*, 222 Mich App 485, 489; 563 NW2d 716 (1997), this Court held that "an insurer does not owe a duty to the insured to investigate or verify" a policy applicant's representations "or to discover intentional material misrepresentations." Here, Alice Burton advised defendant that Manier resided in her home, and claimed to have no awareness of Manier's driver's license number. Burton also failed to advise defendant that Manier's girlfriend drove the Silhouette. Reviewing the issue de novo, we conclude that defendant could not have "easily ascertained" Burton's misrepresentations at the time she made them. Because no duty of investigation compelled defendant to perform further research regarding Manier's residence, *Farmers* does not control this case, and the circuit court correctly determined that Burton's misrepresentation entitled defendant to reform the policy.

Manier next contends that because the injured minors qualify as "innocent third parties," defendant cannot reform the policy. According to Manier, *Liberty Mut Ins Co v Michigan Catastrophic Claims Ass'n*, 248 Mich App 35, 48; 638 NW2d 155 (2001), supports the proposition that defendant is estopped from reforming

the policy because the children cannot face responsibility for Burton's misrepresentations. In *Liberty*, this Court observed in a footnote that "reformation or rescission may occur if fraud or a material misrepresentation occurred, the insurance coverage was considered optional, and the fraud could not have been ascertained easily by the insurer." *Id*. at 48 n 2.

In *Lake States Ins Co v Wilson*, 231 Mich App 327, 331-332; 586 NW2d 113 (1998), we held that although an insurance company is estopped from asserting fraud to rescind coverage applicable to an innocent third party, "an insurer is not precluded from rescinding the policy to void any 'optional' insurance coverage[.]" "Optional" coverage includes " 'any lawful coverage in excess of or in addition to the [mandatory minimum] coverage specified for a motor vehicle liability policy.' " *Id*. at 332 n 2, quoting MCL 257.520(g). Here, defendant reformed the policy without altering the original liability coverage limit of $100,000 a person and $300,000 for each occurrence. Therefore, we reject as factually unfounded Manier's claim that defendant unlawfully reformed the policy.

Lastly, Manier asserts that Michigan's financial responsibility statute, MCL 257.501 *et seq*., forbids defendant's household-related exclusion. The financial responsibility act requires certain motor vehicle insurance for the owner or operator of a vehicle, including minimum coverage limits of $20,000 per person and $40,000 per occurrence for injury arising out of the ownership, maintenance, or use of the vehicle. MCL 257.520(b)(2). According to Manier, *Gurwin v Alcodray*, 77 Mich App 97; 257 NW2d 665 (1977), "settled" this issue by holding that household exclusions violate public policy and the financial responsibility act. In *Gur-*

win, the exclusion eliminated liability coverage for members of the insured's household. *Id.* at 99.

But the exclusion at issue in this case does not eliminate coverage for members of the insured's household; rather, it limits liability coverage to the minimum provided in MCL 257.520(b)(2). If a clause in an insurance policy is clear and does not contravene public policy, it must be enforced as written. *Farm Bureau Mut Ins Co of Michigan v Nikkel*, 460 Mich 558, 568; 596 NW2d 915 (1999). "An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). Manier has not identified any Michigan caselaw invalidating a no-fault policy's household exclusion, where statutorily adequate residual liability coverage exists. This Court has upheld household exclusions in other circumstances. *Bogas v Allstate Ins Co*, 221 Mich App 576; 562 NW2d 236 (1997), and *Geller v Farmers Ins Exch*, 253 Mich App 664; 659 NW2d 646 (2002). Consequently, we reject Manier's claim regarding the validity of the household exclusion.

Affirmed.

SNYDER v ADVANTAGE HEALTH PHYSICIANS

Docket No. 274327. Submitted February 13, 2008, at Lansing. Decided November 18, 2008, at 9:00 a.m.

Margaret and Thomas Snyder served Chad Williams, M.D., Advantage Health Physicians, and others with notices of intent to bring a medical-malpractice action against the notice recipients. The Snyders then filed in the the Kent Circuit Court a medical-malpractice complaint that did not include Williams as a defendant. More than 91 days after the defendants filed their answer, they moved for leave to file a notice of nonparty fault asserting fault by Williams. The court, George S. Buth, J., granted the motion. The plaintiffs appealed by leave granted.

The Court of Appeals *held*:

MCR 2.112(K)(3)(c) required that a notice of nonparty fault be filed within 91 days after a defendant files its first responsive pleading, but permits a court to allow a later filing of the notice on motion by the defendant and upon a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party. Here—where the defendant's attorney had also counseled Williams about the same matter, the notices of intent suggested malpractice by Williams, but the defendants failed to undertake some direct and independent action to investigate a potential defense based on Williams's possible malpractice—the defendants failed to establish that the facts underlying their notice of nonparty fault by Williams could not, with reasonable diligence, have been known earlier.

Reversed and remanded for further proceedings.

Grysen & Associates (by *B. Elliot Grysen*) for the plaintiffs.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *Carol D. Carlson*) for the defendants.

Before: WILDER, P.J., SAAD, C.J., and SMOLENSKI, J.

PER CURIAM. Plaintiff[1] appeals by leave granted the lower court's order granting defendants leave to file a notice of nonparty fault against Dr. Chad Williams. We reverse and remand.

I

Before August 2002, plaintiff was active and in good health, and a patient of Caledonia Family Practice and of Dr. Jennifer H. Battiste. In August 2002, plaintiff went to the Caledonia Family Practice with complaints of numbness in her toes and fingers, and was examined at that time by Dr. Battiste. In September 2002, lumbar spine x-rays taken at Saint Mary's Mercy Medical Center (St. Mary's) revealed mild disc space narrowing in the lower lumbar spine. A magnetic resonance imaging (MRI) of plaintiff's lumbar spine conducted on the same day at St. Mary's revealed a mass in plaintiff's uterus. In light of this result, Dr. Battiste advised plaintiff to have an ultrasound. In early October 2002, Dr. Williams, a radiologist, performed, at St. Mary's, the ultrasound recommended by Dr. Battiste. A few days later, Dr. Williams authored a report that interpreted the ultrasound study to find a lipoleiomyoma (a common benign, smooth muscle tumor in the uterus). Williams's report interpreted the mass to represent a 7.2 cm lipoleiomyoma.

A copy of Dr. Williams's ultrasound report was sent to Dr. Battiste, who informed plaintiff that the mass was benign. Dr. Battiste did not recommend any additional workup or a consultation with a gynecologist.

Plaintiff suffered heavy postmenopausal bleeding in May and July 2003. At the end of July 2003, plaintiff's

[1] "Plaintiff" refers to the principal plaintiff, Margaret Snyder.

gynecologist diagnosed the mass in plaintiff's uterus as a liposarcoma (a form of cancer). In July 2003, plaintiff underwent extensive surgery to remove her uterus, ovaries, fallopian tubes, and cervix. Unfortunately, the cancer had already spread, and the operating physicians were unable to remove all of it. According to plaintiffs, had plaintiff's uterine mass been timely diagnosed as a liposarcoma, and had surgery to remove it been performed in October 2002 instead of July 2003, plaintiff's chances of survival would have been greater than 90 percent, but with the delayed diagnosis her chances of survival dropped to less than 15 percent.

In July 2004, plaintiffs, pursuant to MCL 600.2912b, sent a notice of intent to sue to St. Mary's and its employees and providers, Dr. Williams and any employing professional corporation, Dr. Battiste and any employing professional corporation, Caledonia Family Practice and its employees and providers, and Advantage Health Physicians and its employees and providers. On November 5, 2004, counsel for potential defendant St. Mary's acknowledged receipt of the notice of intent to sue St. Mary's and informed plaintiffs' counsel that she represented St. Mary's.[2] Counsel for St. Mary's then spoke with plaintiffs' attorney over the telephone, in which conversation plaintiffs' counsel informed St. Mary's counsel that plaintiffs would not be suing St. Mary's or Dr. Williams. Upon learning this, counsel for St. Mary's immediately stopped working on the case. None of the potential defendants provided a written response to the initial notice of intent.

On November 15, 2004, after reviewing the available medical reports and records and consulting with their experts, plaintiffs filed an amended notice of intent to

[2] Counsel for St. Mary's did not, at that time, specify that it was also representing Dr. Williams.

sue (NOI). This amended NOI omitted Dr. Williams and St. Mary's as potential defendants. It is unclear from the record which potential defendants, if any, responded to this amended NOI.

On February 15, 2005, plaintiffs filed a complaint naming Advantage Health Physicians, Caledonia Family Practice, and Dr. Battiste as defendants. The complaint did not name St. Mary's or Dr. Williams as defendants. Counsel who had previously represented potential defendant St. Mary's was retained to represent the named defendants, and filed an answer on their behalf on March 18, 2005. Defendants did not file a notice of nonparty at fault within "91 days after the party files its first responsive pleading." MCR 2.112(K)(3)(c). However, after discovery, during which the records of Dr. Donald Heggen, plaintiff's obstetrician/gynecologist, first became available in the litigation, defendants, on December 13, 2005, filed a motion to permit the delayed filing of a notice of nonparty fault naming Dr. Heggen. Defendants asserted "that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier." Plaintiff did not oppose this motion. On February 6, 2006, the trial court entered an order granting defendants' motion, and on February 9, 2006, defendants filed a notice of nonparty fault against Dr. Heggen.

In April 2006, a cancerous mass was discovered in plaintiff's lung.

On August 24, 2006, Dr. Williams was deposed. According to defense counsel, Dr. Williams was not represented by counsel at his deposition. The following exchange took place between plaintiff's counsel and Dr. Williams:

> *Q*. So from the radiographic appearance on ultrasound and MRI, were you able to say with certainty what was causing this mass?
>
> *A*. No, not with a hundred percent certainty.

* * *

Q. Were you able to reach the conclusion that this mass was benign or malignant to a hundred percent degree or certainty by just the radiographic appearance?

A. A lipoleiomyoma is benign, therefore, my impression was that this was a benign mass.

Q. And my question was, were you able to reach that conclusion to a hundred percent degree of certainty without tissue diagnosis?

* * *

A. Obviously not in this case, because I was wrong.

* * *

Q. We took Dr. Battiste's deposition, and she did have some recollection of talking to you. Have you reviewed that?

A. No.

Q. I'll read it to you and then hand it to you. She said at page 41, I asked her—I was taking the deposition—"and do you recall what the conversation was about?" And her answer was, "Just his definition of a lipoleiomyoma, to make sure that I was giving the correct information to her." And I said, "Sure, and what was his definition of a lipoleiomyoma?" His answer was that it was a fibroid, and the question was, "Okay"—from me against [sic]—"Did you have any conversations with the radiologist about whether he believed it was malignant or benign." "Do you know if lipoleiomyomas are benign?" She answered, "I don't know that." "Do you know what percentage of lipoleiomyomas are benign?" And her answer was, "No."

Do you know, based upon your training, as to what percentage of lipoleiomyomas are benign?

A. 100 percent are benign.

Q. All right. If that's true, and I think you told me that earlier, how is it that this one turned out to be malignant?

* * *

A. This was not a lipoleiomyoma.

When Dr. Jonathan M. Alexander, the plaintiff's radiology expert, was deposed on August 25, 2006, he testified as follows, criticizing the radiological interpretation of the plaintiff's pelvic ultrasound:

Q. [By plaintiff's counsel] Can you tell us how you believe a reasonable and prudent radiologist interpreting this ultrasound would—what would be the interpretation—the official interpretation given?

* * *

A. Would be something like irregularly—irregular, incompletely seen hyperechoic uterine mass. Not typical of leiomyoma. And I would suggest a follow-up MRI—full pelvic MRI for further assessment.

Q. Can the diagnosis of what type of mass this is be made by the radiologist?

* * *

A. Ultimately, tissue typing can never be made. We can—we can come close on a full MRI using fat saturation and so forth, but ultimately, no.

* * *

Q. To the best of your recollection, in the conversations that you had with me about these films in 2004, did you express any criticisms of either of the radiologists who read these films?

A. I believe that I felt that they hadn't completely investigated the imaging of this lesion—

Q. Okay.

A. —and didn't request such.

> *Q*. Did you reach an opinion as to whether that violated any standards of radiographic interpretation to suggest exactly what tests should be done?
>
> * * *
>
> *A*. Yes. As I said, I think this was—should not have been left as done.

On cross-examination, Alexander indicated that had the radiologists who read the MRI been named as defendants in this action, he would have been comfortable opining that the radiologist's interpretive work fell below the requisite standard of care.

After receiving the transcript of Dr. Williams's deposition, defendants, on October 17, 2006, and pursuant to MCR 2.112(K), moved in the trial court for leave to file a notice of nonparty fault against Dr. Williams. Defendants argued that the delay in seeking permission to file such a notice was not caused by dilatory conduct but by a surprising revelation during discovery that Dr. Williams may be at fault.

Plaintiffs opposed the motion, arguing that because the notice of intent included Williams, and because counsel represented St. Mary's, Dr. Williams's employer, when the notice of intent was mailed, there was no reason why defendants could not have discovered Dr. Williams's potential liability in the two years since the notice of intent was sent. Plaintiffs argued that defendants took no action to investigate whether Dr. Williams was negligent in interpreting the ultrasound.

A hearing on defendants' motion to file a delayed notice of nonparty fault was held on October 20, 2006. The trial court agreed with defendants, and granted the motion.

On October 31, 2006, plaintiffs filed a second amended NOI. This NOI was addressed, among others,

to St. Mary's and its employees, Dr. Williams, and any professional corporation employing Dr. Williams. It is unclear from the record whether any defendants responded to the second amended NOI.

On November 14, 2006, the trial court entered an order granting defendants' motion for leave to file a delayed notice of nonparty fault. On November 15, 2006, plaintiffs filed an application for leave to appeal in this Court. On December 7, 2006, this Court granted plaintiffs' application for leave to appeal.

On December 26, 2006, plaintiffs filed a first amended complaint. This pleading included Dr. Williams as a party defendant. On February 15, 2007, Dr. Williams, through an attorney different from the attorney for the four defendants named in the original complaint, filed an answer to the first amended complaint.

II

We review de novo the interpretation and application of a court rule. *Kloian v Domino's Pizza LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006).

III

In a tort action seeking damages for personal injury, the trier of fact must determine the fault of each person or persons who contributed to the injury, regardless of whether such persons were or could have been named as parties. MCL 600.2957(1); MCL 600.6304(1)(b). But the trier of fact may not assess the fault of a nonparty, unless the defendant has given timely notice of the nonparty fault claim. MCR 2.112(K)(2); *Rinke v Potrzebowski*, 254 Mich App 411, 415; 657 NW2d 169 (2002).

Generally, a party must file a notice of nonparty fault within 91 days after the party files its first responsive

pleading. MCR 2.112(K)(3)(c). But "*on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party*," the trial court "shall allow a later filing of the notice . . . ." *Id*. (emphasis added).

Here, it is undisputed that defense counsel failed to comply with the 91-day filing period for a notice of nonparty fault. In fact, defendants moved to file a notice of nonparty fault against Williams long after (more than 550 days after) they filed their answer (their first responsive pleading). The questions presented are (1) whether the facts on which the late notice was based could have been known to defense counsel earlier, through the exercise of reasonable diligence, and (2) if not, whether the late filing would result in unfair prejudice to plaintiff.

The rules of construction of a court rule are as follows:

> Michigan courts construe court rules in the same way that they construe statutes. *Marketos v American Employers Ins Co,* 465 Mich 407, 413; 633 NW2d 371 (2001). "Well-established principles guide this Court's statutory [or court rule] construction efforts. We begin our analysis by consulting the specific . . . language at issue." *Bloomfield Charter Twp v Oakland Co Clerk,* 253 Mich App 1, 10; 654 NW2d 610 (2002). This Court gives effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. See *Willett v Waterford Charter Twp,* 271 Mich App 38, 48, 718 NW2d 386 (2006). If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written. See *Ayar v Foodland Distributors,* 472 Mich 713, 716; 698 NW2d 875 (2005). This Court does not interpret a court rule in a way that renders any language surplusage. See

Pohutski v City of Allen Park, 465 Mich 675, 684; 641 NW2d 219 (2002). [*Kloian, supra* at 458.]

"Reasonable diligence" is not defined in the court rule. We may consult a legal dictionary to define an undefined term that has a specific legal meaning. *Vodvarka v Grasmeyer*, 259 Mich App 499, 510; 675 NW2d 847 (2003). Black's Law Dictionary (8th ed) defines "reasonable diligence" as "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue."

Few of our cases address the circumstances under which a late notice of nonparty fault may be filed. In *Bint v Doe*, 274 Mich App 232; 732 NW2d 156 (2007), a tractor-trailer, which displayed the letters TNT in orange on its wind deflector, struck the plaintiff's vehicle. After the accident, a man wearing a shirt inscribed with the name "Roger" approached the plaintiff. The plaintiff assumed that "Roger" was the driver of the tractor-trailer. The plaintiff also assumed that USF Holland owned the tractor-trailer because it used the orange TNT logo she saw on the wind deflector. In light of these assumptions, the plaintiff sued USF Holland, the driver ("Roger Doe"), and Citizens Insurance. The plaintiff sued Citizens Insurance for unidentified motorist benefits because she believed that she might never identify the owner of the tractor-trailer. The plaintiff subsequently amended her complaint to add other defendants whom she learned used the TNT logo.[3]

Subsequently, Roger Brock and Con-Way Transportation Services, Inc. (Con-Way), were identified as the driver and owner of the tractor-trailer, respectively, and

[3] See *Bint v Doe*, unpublished opinion per curiam of the Court of Appeals, issued February 12, 2004 (Docket Nos. 242252, 242253); *Bint v Doe*, unpublished opinion per curiam of the Court of Appeals, issued August 7, 2001 (Docket No. 220309).

USF Holland filed a notice of nonparty fault against them. Brock and Con-Way moved for summary disposition on the ground that the notice of nonparty fault was not timely. The trial court denied the motion, and this Court affirmed. *Bint, supra* at 236. We explained:

> MCR 2.112(K)(3)(c) provides that a late notice may be filed "on a showing that the facts on which the notice is based were not and could not with reasonable diligence have been known to the moving party earlier, provided that the late filing of the notice does not result in unfair prejudice to the opposing party." USF Holland was among eight defendants in the original complaint. Although USF Holland knew or should have known that it was not involved in the accident, it initially had no reason to suspect that the driver was not already a party to the lawsuit. When USF Holland learned in May 2002 of Brock's alleged involvement, it had a pending summary disposition motion, which was granted. Because plaintiffs appealed that order, the case was not active in the trial court again until October 25, 2004. Therefore, USF Holland had a reasonable explanation for not seeking permission to file a notice of nonparty fault until February 18, 2005. Further, plaintiffs, the opposing parties, were not prejudiced by the late filing of the notice. Therefore, USF Holland complied with the notice requirement. [*Id.*]

This Court concluded that USF Holland could not with reasonable diligence have known of the involvement of Brock and Con-Way before May 2002, because "it had no reason to suspect that the driver was not already a party to the lawsuit." *Id*.

In *Salter v Patton*, 261 Mich App 559; 682 NW2d 537 (2004), the plaintiffs sued six defendants. In April 2002, four of the defendants were dismissed from the lawsuit after they settled with the plaintiffs. On April 8, 2002, the remaining two defendants moved the trial court for leave to file a notice of nonparty fault against the four defendants who had settled. The trial court denied the

motion. On appeal, the Court reversed. *Id.* at 567. Regarding the "reasonable diligence" requirement, the Court wrote:

> Defendants were undoubtedly late in filing the motion because they did so well over ninety-one days from the time they filed their first responsive pleading. However, as defendants point out, all the parties named in their notice were parties to the action up to the time they settled, and discovery was comprehensive. Furthermore, after the settlement, defendants almost immediately filed their motion to file notice of nonparty fault. Indeed, the court rule requires the trial court to grant the motion in this case because defendants could not have known about the need to file notice until after the settlement. [*Id.*]

Contrary to defendant's argument on appeal, the present case is distinguishable from *Salter*. In *Salter*, it was undisputed that the notice of nonparty fault could not have been filed within 91 days of when the defendants filed their first responsive pleading or at any time before the settlement. Before the settlement, the four parties, who were eventually named as nonparties-at-fault, were actually parties in the case. Notice of nonparty fault was unnecessary until settlement. In the present case, however, there is a dispute about whether defendants could have discovered before Williams's deposition the facts that led to their motion for leave to file a notice of nonparty fault against Williams. The issue in the present case is whether defendants acted with reasonable diligence, despite not conducting any investigation into the specific role Williams played in the misdiagnosis of plaintiff's uterine mass.

Defendants contend that their reliance on the assertion by plaintiff's counsel, made during the notice of intent period, that plaintiff would not sue Dr. Williams or St. Mary's Mercy Medical Center because plaintiff was unable to discover any evidence to support claims

against them constitutes the reasonable diligence required by MCR 2.112(K)(3)(c). We cannot agree. The notice of intent stated that Dr. Williams interpreted the findings of the ultrasound to represent a lipoleiomyoma (a benign mass). The notice of intent also stated that a copy of the ultrasound report, which contained the incorrect interpretation, was sent to Dr. Battiste. In addition, the notice of intent stated that in July 2003 plaintiff's uterine mass was discovered to be a sarcoma (a malignant mass). Thus, the notice of intent suggested that Dr. Williams misinterpreted the findings of the ultrasound, and that his misinterpretation was passed on to Dr. Battiste. The complaint further suggested the possibility that Dr. Williams misinterpreted the findings of the ultrasound, when the complaint asserted that despite the statement in the ultrasound report that the uterine mass was benign, the mass was in fact malignant.

If Dr. Williams's interpretation of the findings of the ultrasound fell below the standard of care for a radiologist, then defendants had a potentially viable defense or partial defense to the claims against them, i.e., that Dr. Williams misdiagnosed the mass and Dr. Battiste merely relied on the misdiagnosis. The exercise of reasonable diligence would have involved undertaking some direct and independent action to investigate this potential defense, yet, despite having "reason to suspect" that this potential defense existed, defendants undertook no independent investigation. *Bint, supra* at 236.

Accordingly, the trial court erroneously concluded that defendants exercised reasonable diligence. We reverse the trial court's order, because defendants failed to establish that the facts underlying their notice of nonparty fault against Dr. Williams could not, with

reasonable diligence, have been known earlier. Because we hold that defendants failed to exercise reasonable diligence, the issue whether unfair prejudice would result to plaintiffs, from allowing the late filing of the nonparty fault notice, is moot. *The Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 61; 744 NW2d 174 (2007).

IV

The trial court erred by ruling that defendant's conduct satisfied the "reasonable diligence" requirement of MCR 2.112(K)(3)(c).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

HOLMAN v RASAK

Docket No. 279879. Submitted November 13, 2008, at Detroit. Decided November 18, 2008, at 9:05 a.m. Leave to appeal sought.

Andrea L. Holman, as personal representative of the estate of Linda Clippert, deceased, brought a wrongful-death medical-malpractice action in the Oakland Circuit Court against Mark Rasak, D.O. The defendant moved for a qualified protective order allowing him to conduct an ex parte interview with the decedent's treating physician. The court, John J. McDonald, J., denied the motion, ruling that the provision of the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d, relating to a protective order pertains to documentary evidence only and that HIPAA does not authorize ex parte oral interviews. The defendant appealed by leave granted.

The Court of Appeals *held*:

If, as in this case, written consent or an agreement for the disclosure of confidential health information is not provided, a treating physician may only disclose such information under conditions set out in HIPAA regulations, one of which, 45 CFR 164.512(e)(1), provides for qualified protective orders. If a qualified protective order consistent with 45 CFR 164.512(e)(1) is in place, an ex parte discussion with the health provider may take place.

Reversed and remanded

HEALTH — HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT — MEDICAL MALPRACTICE — PROTECTIVE ORDERS — EX PARTE INTERVIEW WITH HEALTH-CARE PROVIDERS.

A medical-malpractice defendant may conduct an ex parte interview with the plaintiff's or decedent's treating physician if a qualified protective order consistent with a federal regulation concerning the Health Insurance Portability and Accountability Act is in force (42 USC 1320d *et seq*.; 45 CFR 164.512[e][1]).

Blum Konheim Elkin & Ceglarek (by *Joseph L. Konheim* and *Stephanie L. Arndt*) for the plaintiff.

O'Connor, DeGrazia, Tamm & O'Conner, P.C. (by *Julie McCann O'Connor* and *Donald K. Warwick*), for the defendant.

Before: JANSEN, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM. In this medical-malpractice action, defendant appeals by leave granted the circuit court's order denying his motion for a qualified protective order to allow him to conduct an ex parte interview with the decedent's treating physician. We reverse and remand.

Plaintiff filed this wrongful-death medical-malpractice action alleging that defendant had failed to properly diagnose or treat plaintiff's decedent, Linda Clippert, thereby proximately causing her death. Defendant sought to interview Clippert's treating physician, but plaintiff refused to waive Clippert's confidentiality rights under the Health Insurance Portability and Accountability Act (HIPAA), 42 USC 1320d *et seq*. Plaintiff signed a waiver allowing the release of medical records, but refused to provide a release for oral communications. Defendant moved for a qualified protective order to permit an ex parte interview with Clippert's treating physician, but the circuit court denied the motion. The court concluded that "the HIPAA provision relative to a protective order only . . . pertains to documentary evidence" and "that HIPAA does not authorize ex parte oral interviews."

A circuit court's decision on a discovery motion is reviewed for an abuse of discretion. *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001). However, an issue of statutory interpretation is reviewed de novo as a question of law. *Rakestraw v Gen Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666

NW2d 199 (2003). Although the decisions of lower federal courts are not binding on Michigan state courts, *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004), we are free to adopt their analysis if it is persuasive and instructive, *Cowles v Bank West*, 476 Mich 1, 33-34; 719 NW2d 94 (2006).

HIPAA regulates the retention, use, and transfer of patient information by health-care providers. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007); see also *Bayne v Provost*, 359 F Supp 2d 234, 236 (ND NY, 2005). HIPAA "authorizes regulations governing confidential patient information." *In re Petition of Attorney General*, *supra* at 699. "Under this authority, regulations have been promulgated establishing procedures for the uses and disclosure of such information." *Id*. These regulations make clear that HIPAA applies to both oral and written information. 45 CFR 160.103 (providing that "[h]ealth information means any information, whether oral or recorded in any form or medium"). HIPAA does not prohibit all ex parte communications with an adverse party's treating physician. *Law v Zuckerman*, 307 F Supp 2d 705, 708 (D Md, 2004). "However, HIPAA clearly regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." *Id*.

In Michigan, it was well established before the enactment of HIPAA that the filing of a lawsuit for personal injury or malpractice generally waived the statutory physician-patient privilege with respect to any injury, disease, or condition at issue in the lawsuit, MCL 600.2157, and that a defendant was permitted to meet ex parte with the injured party's treating physician as part of discovery, see *Domako v Rowe*, 438 Mich 347, 361-362; 475 NW2d 30 (1991).

Under HIPAA, however, the filing of a lawsuit does not waive the confidentiality of health information, and unless the patient gives written consent or enters into an agreement, see 45 CFR 164.508; 45 CFR 164.510, the patient's physician may only disclose confidential health information under limited conditions. As observed in *Law*, *supra* at 711:

> HIPAA outlines the steps to follow in order to obtain protected health information during a judicial proceeding in 45 CFR 164.512(e). There are three ways. First, counsel may obtain a court order which allows the health care provider to disclose "only the protected health information expressly authorized by such order." 45 CFR 164.512(e)(1)(i). In the absence of a court order, [45 CFR] 164.512(e)(1)(ii)(A) and (B) provide two additional methods available when used in conjunction with more traditional means of discovery.

Specifically, 45 CFR 164.512(e) provides in pertinent part:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
>
> (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
>
> (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

* * *

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(iv) of this section.

(2) Other uses and disclosures under this section. The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

We agree with plaintiff that HIPAA supersedes Michigan law to the extent that its protections and

requirements are more stringent than those provided by state law. See *Law*, *supra* at 711. Thus, if written consent or an agreement for the disclosure of confidential health information is not provided, a treating physician may only disclose such information under conditions set out in the HIPAA regulations, one of which provides for qualified protective orders.

But we disagree with the circuit court's determination that a defendant's ex parte interview with a treating physician may not be the subject of a qualified protective order under HIPAA. While 45 CFR 164.512(e)(1)(ii) does not specifically address oral communications, neither does it exclude oral or spoken information from the regulations governing disclosure of protected health information. As our Supreme Court observed in *Domako*, *supra* at 362, where rules are not meant to be exhaustive, "the omission of oral interviews does not mean that they are prohibited." In fact, 45 CFR 160.103 specifically provides that HIPAA applies to both oral and written information, and 45 CFR 164.512(e)(2) makes clear that the regulations concerning qualified protective orders "do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information." Thus, as the federal district court determined in *Bayne*, *supra* at 241, "if a qualified protective order, consistent with [45 CFR 164.512(e)], was in place then an *ex parte* discussion with the health provider would be appropriate."

Plaintiff argues that it should be sufficient for defendant to rely on written medical records or to depose Clippert's physicians if more information is desired. However, as our Supreme Court observed in *Domako*, *supra* at 360, it is "routine practice . . . to talk with each witness before trial to learn what the witness knows

about the case and what testimony the witness is likely to give" and "[t]here is no justification for requiring costly depositions . . . without knowing in advance that the testimony will be useful." *Id*. at 361.

The circuit court erroneously concluded that oral interviews cannot be the subject of qualified protective orders under HIPAA. Quite simply, defendants may conduct an ex parte oral interview with Clippert's physician if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is first put in place. *Bayne*, *supra* at 241. We reverse the circuit court's decision and remand this case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

In re JENKS

Docket Nos. 284387 and 284388. Submitted November 4, 2008, at Lansing. Decided November 20, 2008, at 9:00 a.m.

The Department of Human Services petitioned the Washtenaw Circuit Court, Family Division, to terminate the parental rights of James Jenks to his two minor children. Jenks subsequently pleaded guilty of first-degree criminal conduct for sexually abusing his stepdaughter, who was a half-sister to the children in this case. The court, Donald E. Shelton, J., concluded that the department had established by clear and convincing evidence grounds for termination under MCL 712A.19b(3)(b)(*i*) and (*iii*), (g), (h), (j), and k(*ii*). The court also concluded that it was not clearly contrary to the children's best interests to terminate his parental rights, and the court did so. Jenks appealed, asserting that the court erred by finding that the department had established by clear and convincing evidence any statutory ground for termination.

The Court of Appeals *held*:

The trial court did not clearly err by determining that the department had established by clear and convincing legally admissible evidence the grounds for termination set forth in MCL 712A.19b(3)(b)(*i*) and k(*ii*). Jenks admitted that his sexual abuse of his stepdaughter included penetration, conduct covered by those statutes. Given the nature of Jenks's conduct, the trial court did not clearly err by determining that there was a reasonable likelihood that the minor children would suffer injury or abuse in the foreseeable future if placed in Jenks's home. Having found that at least one statutory ground for termination was established by clear and convincing evidence, the trial court was required to terminate Jenks's parental rights unless there was clear evidence on the whole record that termination was not in the children's best interests. Considering the nature of Jenks's criminal sexual conduct and the length of his incarceration for that offense, termination was not clearly contrary to the children's best interests.

Affirmed.

Brian L. Mackie, Prosecuting Attorney, and *David A. King*, Assistant Prosecuting Attorney, for the petitioner.

Adil Haradhvala for the respondent.

Before: FITZGERALD, P.J., and BANDSTRA and SCHUETTE, JJ.

PER CURIAM. In these consolidated appeals, respondent, James Jenks, appeals as of right the trial court's February 22, 2008, order terminating his parental rights to the minor children under MCL 712A.19b(3)(b)(*i*) and (*iii*), (g), (h), (j), and (k)(*ii*). We affirm.

The minor children came to the attention of petitioner, the Department of Human Services, on September 1, 2006, when it was discovered that the children's home was in deplorable condition and without running water. Thereafter, on October 23, 2007, respondent pleaded guilty to one count of first-degree criminal sexual conduct with a person under 17 years of age for his conduct in sexually abusing his stepdaughter, who is the minor children's half-sister. As part of his plea, respondent admitted his sexual penetration of the stepdaughter. On November 27, 2007, respondent was sentenced to serve a prison term of 5 to 15 years for that offense.

Petitioner sought to terminate respondent's parental rights on the basis of his admitted sexual abuse of the other child. Petitioner presented no witnesses at the termination hearing, relying on respondent's order of conviction and judgment of sentence as establishing grounds for termination. Respondent presented a single witness, who testified that the children were not of Native American heritage. The trial court found, by clear and convincing evidence, that respondent had committed a sexual penetration of a half-sister of the minor children and that there was a reasonable likeli-

hood that the minor children would suffer injury or abuse if ever placed in respondent's custody. The trial court also concluded that it was not clearly contrary to the children's best interests for respondent's parental rights to be terminated "given the acts he committed against his step-daughter and the length of his incarceration."[1]

Respondent argues that the trial court clearly erred by finding that petitioner established statutory grounds for termination by clear and convincing evidence. We disagree.

To terminate parental rights, the trial court must find that at least one of the statutory grounds for termination set forth in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Sours Minors,* 459 Mich 624, 632; 593 NW2d 520 (1999); *In re Terry,* 240 Mich App 14, 21-22; 610 NW2d 563 (2000). Once a ground for termination is established, the court must order termination of parental rights unless there is clear evidence, on the whole record, that termination is not in the child's best interest. MCL 712A.19b(5); *In re Trejo Minors,* 462 Mich 341, 354; 612 NW2d 407 (2000). If, as in this case, the termination is sought on the basis of grounds new or different from those that led the court to assert jurisdiction over the children, the grounds for termination must be established by legally admissible evidence. MCR 3.977(F)(1)(b).

This Court reviews the trial court's determinations that a ground for termination has been established and regarding the child's best interest under the "clearly erroneous" standard. MCR 3.977(J); *Sours, supra* at

[1] The trial court subsequently terminated the parental rights of the minor children's mother. Her mother's separate appeal of that termination order remains pending in this Court.

633; *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003); *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008).

Contrary to respondent's assertion, we conclude that the trial court did not err by determining that the ground for termination set forth in MCL 712A.19b(3)(b)(*i*) was established by clear and convincing legally admissible evidence. MCL 712A.19b(3)(b) provides for termination if the

> child or a sibling of the child has suffered physical injury or physical or sexual abuse under 1 or more of the following circumstances:
>
> (*i*) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

The record clearly established that respondent sexually abused the minor children's half-sister; respondent does not dispute this. And the statute clearly encompasses such conduct.[2] Further, considering the nature of

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[2] This Court previously interpreted the prior version of MCL 712A.19b(3)(b)(*i*) as applicable only to conduct perpetrated by the parent of the injured or abused child. Therefore, this Court reluctantly determined that the prior version of this section did not apply if the injured or abused child was not also the child of the parent whose parental rights the petitioner sought to terminate. *In re Powers,* 208 Mich App 582, 591; 528 NW2d 799 (1995). However, the Legislature amended MCL 712A.19b(3)(b)(*i*) in 1997 to clarify that grounds for termination are established when the parent against whom termination is sought is responsible for the physical injury or physical or sexual abuse of a sibling of the minor child, regardless of whether that parent is also a parent of the injured or abused sibling. Thus, as amended, MCL 712A.19b(3)(b)(*i*) sets forth a ground for termination in circumstances such as those

respondent's criminal sexual conduct with the other child, which included penetration, the trial court did not clearly err in determining that there is a reasonable likelihood that the minor children would suffer injury or abuse in the foreseeable future if placed in respondent's home. Therefore, the trial court did not clearly err in finding that this ground for termination was established by clear and convincing legally admissible evidence.

Termination was likewise warranted under MCL 712A.19b(3)(k)(*ii*), which provides for termination if the parent whose parental rights the petitioner seeks to terminate sexually abused the child or a sibling of the child and that abuse included penetration, attempted penetration, or assault with intent to penetrate. Respondent admitted that his sexual abuse of the other child included penetration. Therefore, the trial court also did not clearly err by finding that this ground for termination was established by clear and convincing legally admissible evidence.[3]

Having found that at least one statutory ground for termination was established by clear and convincing evidence, as noted above, the trial court was required to terminate respondent's parental rights unless there was clear evidence, on the whole record, that termination was not in the children's best interests. MCL

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presented here, in which respondent sexually abused a half-sister of the minor children who are the subject of the termination proceedings, regardless of the fact that respondent was not also a parent of that abused half-sister. MCL 712A.19b(3)(b)(*i*).

[3] Because we conclude that grounds for termination were established by clear and convincing evidence under MCL 712A.19b(3)(b)(*i*) and (k)(*ii*), we need not address the remainder of the grounds for termination cited by the trial court in terminating respondent's parental rights to the minor children. *In re Powers Minors*, 244 Mich App 111, 118-119; 624 NW2d 472 (2000). We do note, however, that termination in this case could not properly be based on MCL 712A.19b(3)(b)(*iii*).

712A.19b(5); *Trejo, supra* at 354. Respondent does not argue that termination was not in the children's best interests; rather, he asserts only that, because petitioner did not establish at least one statutory ground for termination by clear and convincing evidence, the trial court was not permitted to consider the best interests of the children. We disagree. Having affirmed the trial court's conclusion that petitioner appropriately established at least one statutory ground for termination, we find no clear error in the trial court's conclusion that, considering the nature of respondent's criminal sexual conduct with the minor children's half-sister and the length of his incarceration for that offense, termination was not clearly contrary to the minor children's best interests.

We affirm.

PETRELIUS v HOUGHTON-PORTAGE TOWNSHIP SCHOOLS

Docket No. 278494. Submitted November 4, 2008, at Lansing. Decided November 20, 2008, at 9:05 a.m.

The board of review of the Employment Security Commission, now the Unemployment Insurance Agency, awarded William M. Petrelius, a custodian for the Houghton-Portage Township Schools, unemployment benefits for a six-week layoff during the summer break between two school years. The Houghton Circuit Court, Garfield W. Hood, J., affirmed the board's decision. The Houghton-Portage Township Schools appealed by leave granted.

The Court of Appeals *held*:

Pursuant to MCL 421.27(i)(2), employees working for an education institution, who are not teachers, researchers, or principal administrators, may not receive unemployment benefits during summer break if, as in this case, they have reasonable assurance that they will be working in the school year that follows the summer break.

Reversed and remanded to the board of review.

Gregory, Moore, Jeakle, Heinen & Brooks, P.C. (by *Gordon A. Gregory*), for William M. Petrelius.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Mark F. Davidson* and *Roland Hwang*, Assistant Attorneys General, for the Department of Labor & Economic Growth, Unemployment Insurance Agency.

Thrun Law Firm, P.C. (by *Roy H. Henley*), for the Houghton-Portage Township Schools.

Before: FITZGERALD, P.J., and BANDSTRA and SCHUETTE, JJ.

PER CURIAM. Appellant, Houghton-Portage Township Schools (the school district), appeals by leave granted the trial court's order affirming a decision by the Employment Security Commission Board of Review (now the Unemployment Security Board of Review) to award unemployment benefits to claimant, William M. Petrelius, a custodian, for a layoff period of about six weeks in the summer of 2005. The school district argues that the trial court and the board of review erred in finding that claimant is eligible for unemployment benefits. The school district maintains that the plain language of MCL 421.27(i)(2) precludes the award of unemployment benefits. We agree with the school district, reverse the decision of the board of review, and remand this case to the board.

"A final agency decision is subject to court review, but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record. 'Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence.' " *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583-584; 701 NW2d 214 (2005) (citations omitted). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Id*. at 585. "A finding is clearly erroneous where, after reviewing the record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.*

Statutory interpretation presents a question of law subject to review de novo. *Brown v Detroit Mayor*, 478

Mich 589, 593; 734 NW2d 514 (2007). While appellate courts give respectful consideration to the construction of statutory provisions by any particular department of the government, the department's interpretation is not binding on the court and cannot be used to overcome a statute's plain meaning. *In re Rovas Complaint Against SBC Michigan*, 482 Mich 90, 103; 754 NW2d 259 (2008). The primary goal of statutory construction is to discern and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The words of a statute provide the most reliable evidence of the Legislature's intent. *Id*. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plainly expressed meaning, and further judicial construction is neither required nor permitted. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000).

MCL 421.27(i)(2), also known as the "school denial period" provision, provides:

> With respect to service performed in other than an instructional, research, or principal administrative capacity for an institution of higher education as defined in section 53(2) or for an educational institution other than an institution of higher education as defined in section 53(3), benefits shall not be paid based on those services for any week of unemployment beginning after December 31, 1977 that commences during the period between 2 successive academic years or terms to any individual if that individual performs the service in the first of the academic years or terms and if there is a reasonable assurance that the individual will perform the service for an institution of higher education or an educational institution other than an institution of higher education in the second of the academic years or terms.

It is undisputed that the period of unemployment at issue occurred between two successive academic years,

that claimant performed services for the school district in the first of those academic years, and that claimant was given reasonable assurance that he would perform services for the school district in the second of those academic years. MCL 421.27(i)(2) states that "benefits shall not be paid" for any week of unemployment commencing between successive academic years under such circumstances. The phrase "shall not" is unambiguous and denotes a mandatory, rather than a discretionary, action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002).

This Court has explained the operation of the school denial provision as follows: "In simpler terms, employees working for an educational institution, who are not teachers, researchers, or principal administrators, may not receive unemployment benefits during summer break if they have a reasonable assurance that they will be working in the academic year that follows the summer break." *Adams v West Ottawa Schools*, 277 Mich App 461, 463; 746 NW2d 113 (2008). In the present case, because the layoff period was during the summer break and claimant was given reasonable assurance that his duties would resume in the following academic year, he is not eligible for benefits. *Id.*; See also *Riekse v Grand Rapids Pub Schools*, 144 Mich App 790, 792-793; 376 NW2d 194 (1985).

The denial of benefits unquestionably results in hardship for claimant. However, the school denial period provision is an expression of legislative intent not to protect all persons who might be in a position to claim involuntary unemployment. *Paynes v Detroit Bd of Ed*, 150 Mich App 358, 367; 388 NW2d 358 (1986). Its clear language cannot be ignored on the basis of any alleged general purposes or legislative intent underlying the statute. Directly contrary to appellees' argu-

ments, even the statutory declaration of policy, MCL 421.2, only becomes helpful "if [specific disqualification provisions are] vague or ambiguous," *Thomas v Employment Security Comm*, 356 Mich 665, 668-669; 97 NW2d 784 (1959), and that is not the case here. In other words, even if the statute is to be liberally construed to fulfill its employee protection purposes, such construction cannot ignore and contradict specific limitations on that protection. Courts should not nullify the clear policy choice made by the Legislature in MCL 421.27(i)(2) and thereby undermine the legitimate expectations of Michigan citizens that laws will be enforced as written. See *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 42; 732 NW2d 56 (2007).

Claimant emphasizes that, in the years before 2003, he was employed throughout the summer, and he notes that his pay structure and benefits reflected that full-year employment. However, MCL 421.27(i)(2) neither provides an exception for employees who may have been offered employment for the period between two successive academic years in years past, nor does it permit consideration of an employee's subjective expectations regarding the possibility of continued employment between two successive academic years.[1] We reiterate that, by its plain language, MCL 421.27(i)(2) applies to any week of unemployment between successive academic years for any individual performing services in the first of those years and with a reasonable assurance of performing those services in the second of those years. Claimant's period of unemployment meets this

[1] We note that, with regard to claimant's purported expectation of year-round employment, claimant was not employed for a portion of the summers of 2003 and 2004, and claimant was notified at a meeting during August 2004, and again in writing in March 2005, that he would not be employed from July 1, 2005, until August 15, 2005.

criterion. Thus, MCL 421.27(i)(2) mandates that benefits not be paid for that period.

We need not consider whether claimant's layoff occurred during "customary" or "traditional" vacation periods; any reference to such periods is a reference to a different subsection of the statute, and is not pertinent here. MCL 421.27(i)(3) provides:

> With respect to any service described in subdivision (1) or (2), benefits shall not be paid to an individual based upon service for any week of unemployment that commences during an established and customary vacation period or holiday recess if the individual performs the service in the period immediately before the vacation period or holiday recess and there is a contract or reasonable assurance that the individual will perform the service in the period immediately following the vacation period or holiday recess.

Unlike MCL 421.27(i)(3), the school denial period provision in MCL 421.27(i)(2) does not necessitate consideration of whether the period of unemployment occurred during an "established and customary" vacation period. Rather, the sole consideration in MCL 421.27(i)(2) is whether the period of unemployment took place during the period between two successive academic years. In construing a statute, a court may not presume that the Legislature inadvertently omitted language in one section that it included in another. *South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 530; 734 NW2d 533 (2007). And, of course, cases construing the language of MCL 421.27(i)(3) are simply irrelevant to our consideration of MCL 421.27(i)(2). See, e.g., *Billups v Howell Pub Schools*, 167 Mich App 407, 411-412; 423 NW2d 231 (1988).

We reverse and remand to the board of review for the entry of an order holding that claimant is not eligible for unemployment benefits. We do not retain jurisdiction.

PEOPLE v CONYER

Docket No. 278812. Submitted November 5, 2008, at Lansing. Decided November 25, 2008, at 9:00 a.m.

A Bay Circuit Court jury convicted Kevin J. L. Conyer of assault with intent to do great bodily harm less than murder and possession of a firearm during the commission of a felony. The defendant's convictions arose from a shooting incident that took place during a confrontation at a party. The defendant asserted that he fired shots to defend a person who had been assaulted and was in danger. The defendant's counsel requested a jury instruction that the defendant had no duty to retreat before he engaged in defense of himself or someone else, citing the Self-Defense Act (SDA), MCL 780.971 *et seq*. The court, Kenneth W. Schmidt, J., rejected the request on the ground that the shootings occurred before the effective date of the SDA. The court concluded that the SDA consequently did not apply and gave jury instructions consistent with the common-law rules regarding self-defense, including the duty to retreat. The defendant appealed.

The Court of Appeals *held*:

MCL 780.972(1) allows an individual to use deadly force in certain circumstances to prevent the imminent death of or imminent great bodily harm to the individual or another individual. The SDA did not take effect until October 1, 2006, however, and the shootings took place on January 29, 2006. The SDA contains no language indicating a legislative intent that it apply retroactively, and MCL 780.973 and the enacting sections of the public law that enacted the SDA signal a legislative intent that the SDA apply prospectively only. Because the shooting incident occurred before the SDA's effective date, the defendant's right to use deadly force in self-defense or the defense of another was limited by the common-law duty to retreat.

Affirmed

CRIMINAL LAW — SELF-DEFENSE — DEADLY FORCE — STATUTES — EFFECTIVE DATES OF STATUTES.

The Self-Defense Act applies prospectively only to offenses committed on or after October 1, 2006 (MCL 780.971 *et seq*.).

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Martha G. Mettee*, Assistant Prosecuting Attorney, for the people.

Patrick K. Ehlmann for the defendant.

Before: FITZGERALD, P.J., and BANDSTRA and O'CONNELL, JJ.

PER CURIAM. Defendant appeals as of right his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to serve consecutive prison terms of 30 to 120 months for the assault conviction and two years for the felony-firearm conviction. We affirm.

Defendant's convictions arose from a shooting incident that took place outside a home where a large party was in progress during the early morning hours of January 29, 2006. The victims of the shootings, Alfred Peterson and Matthew Blossey, were at the party, but had been asked to leave. As they left, one or both of them threatened to return with guns. Hearing these threats, Kevin Lijewski's roommate, Shawn Galan, called Lijewski for a ride from the party. Defendant accompanied Lijewski to retrieve Galan. Defendant and Lijewski arrived at the party, located Galan, and were returning to Lijewski's truck to leave when Peterson and Blossey arrived with two other people and in multiple vehicles. Defendant and Lijewski observed Blossey strike a guest with a bottle, so they walked back toward the house. Blossey then walked away, so defendant and Lijewski again started toward Lijewski's vehicle to leave. Before they reached the vehicle, however,

a group of people formed a semicircle around them. Peterson, who admittedly returned to the party intending to fight, struck Lijewski in the head, knocking him to the ground. After he fell, Lijewski saw Blossey running toward him while brandishing a pointy wooden stake. Lijewski fired warning shots into the ground. Defendant asserts that he, too, fired shots to defend Lijewski after Lijewski, who had been assaulted and was in danger, yelled for help. The shots struck Peterson and Blossey.[1]

Defense counsel requested that the trial court instruct the jury, consistently with the recently enacted Self-Defense Act (SDA), MCL 780.971 *et seq.*, that defendant did not have a duty to retreat before he engaged in defense of himself or of someone else under the circumstances presented in this case. The trial court rejected defense counsel's request on the ground that the shootings occurred before the effective date of the SDA and, thus, the SDA was inapplicable. Consequently, the trial court gave the jury instructions consistent with the common-law rules regarding self-defense, including the duty to retreat.

Defendant's sole argument on appeal is that the trial court erred by instructing the jury that defendant had a duty to retreat before using deadly force because the SDA applies retroactively to this case. We disagree.

Whether a statute applies retroactively presents a question of statutory construction, which this Court reviews de novo. *Frank W Lynch & Co v Flex Technolo-*

[1] Defendant was charged with assault with intent to do great bodily harm less than murder, felonious assault, MCL 750.82, and two counts of felony-firearm in connection with the shooting of Blossey. He was acquitted of those charges. Defendant's convictions arose from the shooting of Peterson. Defendant was also convicted of felonious assault and felony-firearm in connection with the shooting of Peterson, but those convictions were dismissed at sentencing on the basis of double jeopardy.

gies, Inc, 463 Mich 578, 583; 624 NW2d 180 (2001). The intent of the Legislature governs the determination whether a statute is to be applied prospectively or retroactively. *Id.* A statute is presumed to operate prospectively "unless the Legislature has expressly or impliedly indicated its intention to give it retrospective effect." *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). Stated differently, a statute is " 'presumed to operate prospectively unless [a] contrary intent is clearly manifested.' " *Lynch*, *supra* at 583, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 671; 375 NW2d 715 (1985); see also *People v Doxey*, 263 Mich App 115, 121; 687 NW2d 360 (2004) (" '[A]mendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent.' ") (citation omitted). However, an exception to this general rule is recognized if a statute is remedial or procedural in nature. *Russo*, *supra* at 594; *People v Link*, 225 Mich App 211, 214-215; 570 NW2d 297 (1997). A statute is remedial if it is designed to correct an existing oversight in the law or redress an existing grievance, or if it operates in furtherance of an existing remedy and neither creates nor destroys existing rights. *Saylor v Kingsley Area Emergency Ambulance Service*, 238 Mich App 592, 598; 607 NW2d 112 (1999); *Link*, *supra* at 214-215. A statute that affects or creates substantive rights is not remedial, and is not given retroactive effect, absent clear indication of legislative intent otherwise. *Lynch*, *supra* at 585.

Section 2(1) of the SDA provides, in part:

> An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if either of the following applies:

> (a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual. [MCL 780.972(1).]

In addition, § 3 of the SDA provides: "Except as provided in section 2, this act does not modify the common law of this state in existence on October 1, 2006 regarding the duty to retreat before using deadly force or force other than deadly force." MCL 780.973. The shootings that gave rise to defendant's arrest took place on January 29, 2006; the SDA did not become effective until October 1, 2006. As acknowledged by § 3 of the SDA, the statute altered the common law of self-defense concerning the duty to retreat. Therefore, even if the SDA perhaps could be characterized as partly remedial, it nevertheless created a new substantive right, i.e., the right to stand one's ground and not retreat before using deadly force in certain circumstances in which a duty to retreat would have existed at common law.[2] Thus, it does not apply retroactively absent an indication that such was the intention of the Legislature in passing the statute. *Lynch*, *supra* at 585 ("[W]e have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively because it can also be characterized in a sense as 'remedial.' ").

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[2] Generally, the use of deadly force in self-defense is justified if a person "honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm." *People v Heflin,* 434 Mich 482, 502; 456 NW2d 10 (1990). However, unless attacked inside one's own home, or subjected to a sudden, fierce, and violent attack, a person has a common-law duty to retreat, if possible, as far as safely possible. *People v Riddle,* 467 Mich 116, 118-121; 649 NW2d 30 (2002). Conversely, under § 2 of the SDA, there is no duty to retreat if the person has not committed or is not committing a crime and has a legal right to be where the person is at the time he or she uses deadly force. MCL 780.972(1). Section 2 of the SDA thus constitutes a substantive change to the right of self-defense.

We conclude that the SDA in general, and MCL 780.972 in particular, apply prospectively only. The SDA contains no language indicating that the Legislature intended the act to apply retroactively. Enacting § 1 of 2006 PA 309 states specifically that the SDA "takes effect October 1, 2006." This is an indication that the Legislature intended the provision to apply prospectively from that date. See *Lynch*, *supra* at 583-584. Additionally, enacting § 2 states that the SDA would not take effect unless other legislative bills, which became 2006 PA 310, 2006 PA 311, 2006 PA 312, 2006 PA 313, and 2006 PA 314, were also enacted into law.[3] This, too, signals a legislative intent that the act apply only prospectively. See *id.* Further, the legislation cited in enacting § 2 relates to the same subject matter and thus is read *in pari materia* with the SDA. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998); *Doxey*, *supra* at 121. None of this legislation suggests any intent that it be applied retroactively. Therefore, all indications are that the Legislature intended the SDA to apply only prospectively. *Doxey*, *supra* at 121.

Section 2 of the SDA, MCL 780.972, affects substantive rights and, as such, cannot be classified as a remedial statute. Therefore, because the Legislature manifested no intent that it apply retroactively, it applies only prospectively, to offenses committed on or after its effective date. Because the incident that formed the basis of defendant's convictions took place before the SDA's effective date, defendant's right to use deadly force in self-defense or defense of others was limited by a duty under the common law to retreat, and the jury instruction reflecting as much was appropriate.

We affirm.

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[3] These acts were codified at MCL 780.961, MCL 780.951, MCL 600.2922c, MCL 768.21c, and MCL 600.2922b, respectively.

In re MARY E GRIFFIN REVOCABLE GRANTOR TRUST

Docket No. 277268. Submitted October 7, 2008, at Lansing. Decided December 2, 2008, at 9:00 a.m. Leave to appeal sought.

Otto Nacovsky, a beneficiary of the Mary E. Griffin Revocable Grantor Trust, filed a petition in the Shiawassee County Probate Court contesting the trust. He alleged that the trust violated the rule against perpetuities because it did not provide for the distribution of the trust corpus after his death and that of Griffin's dogs, the care of which was provided for in the trust. He also alleged that the respondent, Priscilla Hall, who was the trustee of and a beneficiary under the trust, had exercised undue influence over Griffin. The court, James R. Clatterbaugh, J., determined that the perpetuities problem resulted from a drafting error and reformed the trust agreement to remedy the error. The court also found no undue influence. The trust agreement contained a no-contest (*in terrorem*) clause that prohibited a beneficiary who challenged the trust from receiving any portion of Griffin's estate or any benefit under the trust. The respondent moved for summary disposition, arguing that the no-contest clause was enforceable and applied to the petitioner's challenge. The court denied the respondent's motion, holding that the no-contest clause was unenforceable as a matter of law. The respondent appealed.

The Court of Appeals *held*:

1. A no-contest clause in a trust agreement is unenforceable if probable cause exists for challenging the trust. No statute exists addressing the enforceability of no-contest clauses in trust agreements. MCL 700.2518, however, provides that no-contest clauses in wills are unenforceable if probable cause exists for instituting proceedings. That statute, which indicates the state's public policy regarding the enforceability of no-contest clauses in wills, also reflects Michigan's public policy that no-contest clauses in trust agreements are unenforceable if there is probable cause for challenging the trust.

2. The petitioner had probable cause to challenge the trust. A trust is invalid if it violates the rule against perpetuities. Because the trust agreement failed to provide for the distribution of the trust corpus following the death of the petitioner and Griffin's

dogs, the trust, on its face, violated the rule against perpetuities as codified in MCL 554.72. Thus, there was a substantial likelihood that a challenge to the trust based on the perpetuities problem would be successful.

Affirmed.

ZAHRA, J., dissenting, stated that he would reverse and remand for further proceedings. MCL 700.2518 is persuasive evidence that only a no-contest clause in a will is unenforceable if there is probable cause for challenging the will. Michigan's public policy does not dictate that a no-contest clause in a trust agreement is unenforceable if there is probable cause to challenge the trust, and the majority's conclusion is an unwarranted expansion of MCL 700.2518. The statute's plain language concerning wills only is evidence that the Legislature did not intend to allow challenges to a no-contest provision in a trust agreement.

1. TRUSTS — CONTESTING TRUSTS — NO-CONTEST PROVISIONS.

A no-contest, or *in terrorem*, provision in a trust agreement is unenforceable if probable cause exists for challenging the trust.

2. TRUSTS — PERPETUITIES.

A trust is invalid if it violates the rule against perpetuities (MCL 554.72).

Mark J. Hibbs for Otto Nacovsky.

Chalgian & Tripp Law Offices, PLLC (by *John E. Bos*), for Priscilla Hall.

Before: HOEKSTRA, P.J., and CAVANAGH and ZAHRA, JJ.

HOEKSTRA, P.J. This case involves the enforceability of the *in terrorem* (no-contest) clause in the Mary E. Griffin Revocable Grantor Trust agreement. Respondent appeals as of right the probate court's order declaring the clause unenforceable and denying her motion for summary disposition under MCR 2.116(C)(9) and (10). Although MCL 700.2518 does not apply to trusts, we conclude that it reflects this state's public policy that a no-contest clause in a trust agreement is unenforceable if there is probable cause for

challenging the trust. We further conclude that petitioner, Otto Nacovsky, had probable cause to challenge the trust because the trust, on its face, violated the rule against perpetuities. Therefore, the *in terrorem* clause was unenforceable, and we affirm the probate court's order denying respondent's motion for summary disposition.

I

Respondent, Priscilla Hall, is the daughter of petitioner. They are both beneficiaries under a trust created by Mary E. Griffin, who is petitioner's mother and respondent's grandmother. The trust was established in 2001, and the trust agreement was amended several times thereafter, including in January 2003 and May 2003. The January 2003 amendment added the following clause to the trust agreement:

> Terror [sic] Clause. If any beneficiary under this Agreement or any heir of Settlor, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest the admission of Settlor's will to probate, or challenge or contest any provision of Settlor's will or of this Agreement, the beneficiary or heir shall receive no portion of Settlor's estate, nor any benefits under this Agreement. However, it will not be a "challenge or contest" if Trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this Agreement.

After Griffin died in January 2005, petitioner filed a petition contesting the trust. Petitioner alleged that the trust violated the rule against perpetuities because the trust agreement, as last amended on May 1, 2003, provided that the principal was to be held in trust for the benefit of petitioner and Griffin's dogs, but failed to include a provision for the distribution of the trust

corpus after the death of petitioner and the dogs. Petitioner also alleged that Griffin's last two amendments in January 2003 and May 2003 resulted from respondent's undue influence over Griffin. Respondent filed a petition to enforce the *in terrorem* clause. She claimed that, because petitioner had challenged the validity of the trust, if petitioner failed to substantiate his claim of undue influence, petitioner was not entitled to receive anything under the trust.

Following an evidentiary hearing, the probate court determined that the perpetuities problem was the result of a drafting error, and it reformed the trust agreement to remedy the omission of the residuary clause. The court also determined that there was no undue influence. Petitioner thereafter filed a motion alleging defenses to the *in terrorem* clause. Respondent in turn moved for summary disposition pursuant to MCR 2.116(C)(9) and (10), arguing that the *in terrorem* clause was both enforceable and applicable because petitioner had challenged the trust. The probate court determined that because MCL 700.2518 applied to wills but not trusts, the Legislature intended that no-contest clauses in trust agreements be unenforceable. Accordingly, the probate court held that the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement was unenforceable as a matter of law, and it denied respondent's motion for summary disposition.

II

On appeal, respondent does not contest the probate court's conclusion that MCL 700.2518 only applies to wills. Rather, she contests the probate court's conclusion that because the Legislature did not include a provision regarding no-contest clauses in trust agreements in the Estates and Protected Individuals Code,

MCL 700.1101 *et seq.*, a no-contest clause in a trust agreement is unenforceable. Respondent argues that the enforceability of a no-contest clause in a trust agreement must be gleaned from the common law relating to no-contest clauses in wills. We disagree.

A

This Court reviews de novo a lower court's decision on a motion for summary disposition. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 583; 644 NW2d 54 (2002). Below, respondent argued that summary disposition was proper under MCR 2.116(C)(9) because the defense petitioner asserted to her petition to enforce the *in terrorem* clause—that he had probable cause for challenging the trust—was not a defense to the enforcement of a no-contest clause in a trust agreement. A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings and is properly granted when the party has failed to state a valid defense to a claim. A defense is invalid for purposes of MCR 2.116(C)(9) when the party's pleadings are so clearly untenable as a matter of law that no factual development could possibly deny the opposing party's right to recovery. *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004).

B

Whether the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement is enforceable requires us to ascertain our state's public policy regarding the enforceability of no-contest clauses in trust agreements. If no-contest clauses in trust agreements are against public policy, then the *in terrorem* clause at issue here is unenforceable. 2 Restatement Trusts, 3d,

§ 29(c), pp 53-54 (stating that a trust provision is invalid if it is contrary to public policy).

This state's public policy is reflected in its statutes, "and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511; 569 NW2d 857 (1997) (quotation marks and citation omitted). There is no statute regarding the enforceability of no-contest clauses in trust agreements, nor is there any caselaw on the issue. There are, however, caselaw and a statute, MCL 700.2518, addressing the enforceability of no-contest clauses in wills.

In *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929), the Supreme Court held that no-contest clauses in wills were valid and enforceable, irrespective of whether the will contest was in good or bad faith. The Court reasoned:

> Such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation. [*Id.* at 519.]

In *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962), and *Farr v Whitefield*, 322 Mich 275, 280-281; 33 NW2d 791 (1948), the Court reiterated the rule that no-contest clauses in wills are generally enforceable.

However, in 1998, the Legislature enacted MCL 700.2518, which provides:

> A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

This statute reflects the Legislature's decision to partially abrogate the rule announced in *Schiffer*. Accordingly, MCL 700.2518 indicates this state's current public policy regarding the enforceability of no-contest clauses in wills. See *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (" 'In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.' ") (citation omitted). Thus, pursuant to MCL 700.2518, a no-contest clause in a will is unenforceable if probable cause exists for instituting proceedings.

The question becomes whether the public policy regarding the validity of no-contest clauses in wills, as established by MCL 700.2518, controls the enforceability of no-contest clauses in trust agreements. Legal authorities agree that the same test should apply to no-contest clauses in wills and trust agreements. As observed in Bogert, Trusts & Trustees (rev 2d ed, 2008 Cum Supp), § 181, p 103 "Although [*in terrorem*] clauses appear most frequently in wills, there appears to be no reason to apply a different test in determining the validity of such a clause in a living trust instrument . . . ." Similarly, 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment i p 200, provides:

> With the increase in the use of revocable inter vivos trusts as will substitutes, no-contest clauses and clauses restraining challenges of particular provisions in those trusts serve the same purpose as do such clauses in wills, and the same test applies to determine the validity of those clauses in the two comparable situations.

Cf. *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005) (law governing wills typically applies to trusts).

On the basis of these authorities, we conclude that while MCL 700.2518 does not apply to trusts, it reflects this state's public policy that no-contest clauses in trust agreements are unenforceable if there is probable cause for challenging the trust.[1] Conversely, if there is no probable cause to challenge the trust, it is not contrary to public policy to enforce the no-contest clause. Thus, the probate court properly denied respondent's motion for summary disposition under MCR 2.116(C)(9). As a defense to respondent's petition to enforce the *in terrorem* clause, petitioner alleged that he had probable cause to challenge the trust. Because a no-contest clause in a trust agreement is unenforceable if there is probable cause for challenging the trust, petitioner stated a valid defense.

C

Respondent further argues, however, that she was entitled to summary disposition under MCR 2.116(C)(10) because there was no genuine issue of material fact that petitioner lacked probable cause for challenging the trust. We disagree.

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[1] Our conclusion that MCL 700.2518 reflects the public policy of this state with regard to no-contest clauses in trust agreements is consistent, in part, with respondent's argument. Respondent urged us to apply the common law relating to no-contest clauses in wills to the *in terrorem* clause in the present case. Thus, respondent appears to concede that there is no policy reason to treat no-contest clauses in trust agreements differently from no-contest clauses in wills. We just disagree with respondent's contention that the common law, rather than MCL 700.2518, reflects the state's public policy regarding no-contest clauses in trust agreements.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Ins Comm'r*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The Restatement provides the following definition of probable cause: "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment c, p 195. In this case, petitioner sought to terminate the trust on two grounds: (1) it was invalid pursuant to MCL 554.72 because of the perpetuities problem and (2) it was invalid because of undue influence by respondent.[2]

A trust is invalid if it violates the rule against perpetuities. 2 Restatement Trusts, 3d, § 29(b), pp 53-54. The rule against perpetuities is codified in MCL 554.72, which, at the time relevant to this case,[3] provided:

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[2] Although the probate court ultimately determined that the perpetuities problem was the result of a drafting error and there was no evidence of undue influence, the enforceability of the *in terrorem* clause depends on whether petitioner had probable cause to challenge the trust on these bases. Thus, the probate court's ultimate decision on petitioner's claims is not dispositive of whether petitioner had probable cause to bring a challenge in the first instance.

[3] The statute was amended by 2008 PA 149, effective May 28, 2008.

> (1) A nonvested property interest is invalid unless 1 or more of the following are applicable to the interest:
>
> (a) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive.
>
> (b) The interest either vests or terminates within 90 years after its creation.

The last trust amendment failed to include a provision for the distribution of the trust corpus after the death of petitioner and Griffin's dogs. Accordingly, the trust, on its face, violated the rule against perpetuities because it was not certain to vest or terminate within 21 years after Griffin's death or within 90 years after the creation of the trust. Because the trust, on its face, violated the rule against perpetuities, there was evidence from which a reasonable person could conclude that there was a substantial likelihood that a challenge to the trust as violating the rule against perpetuities would be successful. Accordingly, petitioner had probable cause to challenge the trust.[4] Respondent was not entitled to summary disposition under MCR 2.116(C)(10).

D

In conclusion, the probate court properly denied respondent's motion for summary disposition under MCR 2.116(C)(9) and (10). A no-contest clause in a trust agreement is unenforceable if probable cause exists to challenge the trust, and petitioner had probable cause for challenging the trust as violating the rule against perpetuities. Therefore, the *in terrorem* clause in the Mary E. Griffin Revocable Grantor Trust agreement is

[4] Because we conclude that petitioner had probable cause to challenge the trust on the basis that it violated the rule against perpetuities, we need not decide whether petitioner had probable cause to challenge the trust on the basis of undue influence by respondent.

unenforceable. Because the probate court reached the right result, albeit for the wrong reason, we affirm the probate court's order denying respondent's motion for summary disposition. See *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Affirmed.

CAVANAGH, J., concurred.

ZAHRA, J. (*dissenting*). I respectfully dissent. MCL 700.2518 expressly applies to a "provision in a *will* . . . ." (Emphasis added.) I cannot agree with the majority that "while MCL 700.2518 does not apply to trusts, it reflects this state's public policy that [*in terrorem*] clauses in trust agreements are unenforceable if there is probable cause for challenging the trust." *Ante* at 539.

In reaching its decision that *in terrorem* provisions are unenforceable if there is probable cause for challenging the trust, the majority addresses whether an *in terrorem* clause in a trust agreement is contrary to public policy. In *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 722; 706 NW2d 426 (2005), this Court reiterated that,

> "[i]n defining 'public policy,' it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law 'is,' not what it 'ought' to be. [Emphasis in original.]"

For this reason,

> " '[c]ourts must proceed with caution in determining what exactly constitutes Michigan's "public policy," and not merely impose its [sic] belief of what public policy should be. In other words, Michigan's "public policy" must be clearly apparent in "our state and federal constitutions, our statutes, and the common law," as well as our "administrative rules and regulations, and public rules of professional conduct[.]" ' "
>
> In other words, "[t]he public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy." [Citations omitted.]

In my opinion, Michigan public policy does not dictate that an *in terrorem* provision in a trust agreement is unenforceable if there is probable cause for challenging the trust. MCL 700.2518 is persuasive evidence that only an *in terrorem* provision in a *will* is unenforceable if there is probable cause for challenging the will. The majority's conclusion effectively reads into MCL 700.2518 a category of legal instruments in which an *in terrorem* provision may be unenforceable. This is an unwarranted judicial expansion of MCL 700.2518. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (stating that nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself). The best evidence that the Legislature did not intend to allow challenges when the trust agreement contains an *in terrorem* provision is that MCL 700.2518 plainly expresses an intent to allow challenges to a will that contains an *in terrorem* provision. Had the Legislature intended to allow challenges in the face of an *in terrorem* provision within a trust agreement, there is no dispute that it could have done so.

I agree with the majority that the common law of this state, as reflected in *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929), and *Farr v Whitefield*, 322 Mich 275, 280-281; 33 NW2d 791 (1948), is that *in terrorem* clauses in wills are enforceable, irrespective of whether the will contest was in good faith or bad faith. I also agree with the majority that the Legislature, through MCL 700.2518, partially abrogated the common law in regard to *in terrorem* clauses within wills. However, I cannot agree that MCL 700.2518 reflects an intent to partially abrogate the common law in regard to *in terrorem* clauses within trust agreements. And while legal commentators may be correct in speculating that there is no apparent reason to treat *in terrorem* clauses within trust agreements differently from those within wills, I cannot " 'assert what such policy *ought* to be on the basis of' " my subjective view. *Royal Property Group, supra* at 722 (citation omitted; emphasis in original).

I would reverse and remand for further proceedings.

In re APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY

Docket No. 275663. Submitted October 8, 2008, at Grand Rapids. Decided October 14, 2008. Approved for publication December 2, 2008, at 9:05 a.m.

Michigan Consolidated Gas Company (MichCon) filed an application in the Public Service Commission (PSC) seeking, in part, to add uncollectible expense true-up mechanism (UETM) surcharges to the rates it charges customers for natural gas. Under the UETM, the PSC estimates an amount of uncollectible expense to include in setting MichCon's rates for a calendar year. After the calendar year ends, the actual uncollectible expense for the year and the projected amount are compared and, if the actual amount exceeds the estimate, UETM surcharges will be imposed on ratepayers in an attempt to collect 90 percent of the difference from the ratepayers. If the actual amount is less than the estimate, credits are applied in an attempt to return 90 percent of the difference to the ratepayers. The PSC adopted the UETM in an order granting rate relief to MichCon in 2005. The actual uncollectible expense from May 2005 to December 2005 exceeded the estimate and, as a result, the PSC approved MichCon's request for UETM surcharges to its rates for 2007 in an order dated December 21, 2006. The Attorney General appealed, contending that the UETM is unlawful because it is not within the scope of the PSC's statutory authority and is an impermissible retroactive ratemaking mechanism.

The Court of Appeals *held*:

The PSC acted within its general ratemaking powers in adopting the UETM to ensure that the portion of the rates attributable to uncollectible expense would substantially match actual uncollectible expense. The UETM does not involve retroactive ratemaking because the deferred expense is deemed an expense of the year to which it is deferred and, thus, is recovered on a prospective basis.

Affirmed.

PUBLIC UTILITIES — PUBLIC SERVICE COMMISSION — RATEMAKING AUTHORITY.

The Public Service Commission may, within its general ratemaking powers, adopt a ratemaking formula that includes an equalization

> mechanism designed to ensure, to the extent possible, that the amount of a public utility's uncollectible expense attributable to unpaid ratepayers' utility bills for a calendar year matches the amount estimated by the Public Service Commission in setting the rates for that year; an equalization mechanism that defers the excess expense to a future year and that deems such expense to be an expense of the year to which it is deferred collects such expense on a prospective, not a retroactive, basis and is not retroactive ratemaking.

Michael A. Cox, Attorney General, and *Susan I. Leffler* and *Michael E. Moody*, Assistant Attorneys General, for the Attorney General.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Steven D. Hughey* and *Kristin M. Smith*, Assistant Attorneys General, for the Public Service Commission.

Bruce R. Maters and *Michael J. Solo*, and *Fahey Schultz Burzych Rhodes PLC* (by *Stephen J. Rhodes* and *William K. Fahey*) for Michigan Consolidated Gas Company.

Before: MARKEY, P.J., and SAWYER and KELLY, JJ.

PER CURIAM. The Attorney General appeals as of right the December 21, 2006, order of the Public Service Commission (PSC) authorizing Michigan Consolidated Gas Company (MichCon) to add uncollectible expense true-up mechanism (UETM) surcharges to the rates it charged customers for natural gas. We affirm.

The PSC adopted the UETM in an April 28, 2005, order in this case granting rate relief to MichCon. The basic framework of that mechanism is as follows. The PSC estimates an amount of "uncollectible expense"[1] to

[1] Uncollectible expense essentially refers to the amount of unpaid utility bills remaining after MichCon has exhausted its collection efforts with regard to ratepayers unable or unwilling to fully pay those bills.

include in setting MichCon's rates for a calendar year. After that calendar year has ended, the actual uncollectible expense for the year is determined and compared with the projection. If the actual uncollectible expense exceeds the estimate, UETM surcharges will be imposed on ratepayers to attempt to collect 90 percent of the difference between the actual and the estimated uncollectible expense. Conversely, if the actual expense is less than estimated, credits will be applied to attempt to return 90 percent of the difference.[2] However, for the initial period in 2005 underlying this case, only the actual and the estimated uncollectible expenses from May to December were considered. The actual uncollectible expense for that period exceeded the estimated expense included in MichCon's rates. As a result, the PSC approved MichCon's request for surcharges to its rates for 2007 in the December 21, 2006, order being appealed.

The Attorney General argues that the UETM is unlawful because it is not within the scope of the PSC's statutory authority and constitutes an impermissible retroactive ratemaking mechanism. We disagree.

Under MCL 462.25, rates prescribed by the PSC are presumed to be lawful and reasonable. *In re Application of Detroit Edison Co*, 276 Mich App 216, 224; 740 NW2d 685 (2007). A party aggrieved by a PSC order has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. *Id*. To establish the unlawfulness of a PSC order, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in exercising its judgment. *Id*. An order is unreasonable if it is unsupported

[2] The rationale for using 90 percent of the difference is to give MichCon an incentive to maximize its collection efforts to reduce its uncollectible expense.

by the evidence. *Id*. Further, the PSC "has broad ratemaking authority" and "is not bound by any single ratemaking formula, and may make pragmatic adjustments when warranted by the circumstances of the particular matter before it." *Id*. at 243. A rate-design decision should not be disturbed absent a showing that it is "arbitrary, capricious, or an abuse of discretion." *Id*.

This Court's opinion in *In re Application of Consumers Energy Co*, 279 Mich App 180; 756 NW2d 253 (2008), approved for publication on May 27, 2008, after the filing of all the briefs on appeal in this case, requires the rejection of the Attorney General's position that the UETM was outside the PSC's statutory authority and violated the rule against retroactive ratemaking. In that case the Attorney General contended, paralleling its contention regarding the UETM, that an "equalization mechanism" for pension and other post-employment benefits was improper as outside the PSC's authority and as constituting improper retroactive ratemaking. *Id*. at 182, 194. In its relevant aspects, the UETM at issue in this case parallels the equalization mechanism at issue in *Consumers Energy Co*. Specifically, both mechanisms involve the inclusion of an initial projection of the relevant expense (uncollectible expense in this case and pension and other post-employment expenses in *Consumers Energy Co*) in regulated rates with the actual such expense later being compared with that initial amount and a difference between the two rates being deferred for future recovery. See *id*. at 194.

This Court rejected the challenge to the equalization mechanism in *Consumers Energy Co*, stating:

> The Attorney General asserts that approval of this equalization mechanism constituted prohibited retroactive

> ratemaking. The PSC concluded that pursuant to its general ratemaking powers it was authorized to adopt a ratemaking formula that included this equalization mechanism, which was designed to ensure, to the extent possible, that rates would match expenses. We note that the rate is presumed, prima facie, to be lawful and reasonable. *In re Detroit Edison Application, supra* at 224. The Attorney General has failed to overcome this presumption. In *Attorney General v Pub Service Comm,* 262 Mich App 649, 656; 686 NW2d 804 (2004), this Court held that deferred expenses were an expense of the year to which they were deferred, and were therefore prospective. Specifically, this Court noted, " 'when capitalized expenditures are amortized, the amortization becomes a current expense even though it reflects expenditures that were capitalized in the past.' " *Id*., quoting *Ass'n of Businesses Advocating Tariff Equity v Pub Service Comm*, 208 Mich 248, 261; 527 NW2d 533 (1994). There is no sound basis for distinguishing the equalization mechanism approved by the PSC in this case from deferred expenses affirmed in prior caselaw. Accordingly, the deferral of pension and other post-employment benefit expenses to a subsequent year did not constitute retroactive ratemaking. [*Consumers Energy Co, supra* at 194.]

Applying this template to the present case, as with the equalization mechanism in *Consumers Energy Co*, the PSC acted within its general ratemaking powers in adopting the UETM to ensure that the portion of rates attributable to uncollectible expense would substantially match actual uncollectible expense. Further, the UETM, designed to defer 90 percent of the difference between the initially projected and the actual uncollectible expenses for a given period to a future year, does not involve retroactive ratemaking because the deferred expense is deemed an expense of the year to which it is deferred and, thus, is recovered on a prospective basis. Particularly, under the rationale of *Consumers Energy Co*, the 2005 uncollectible expense de-

ferred to 2007 under the order being appealed is a 2007 expense collected on a prospective, not retroactive, basis in 2007.

In light of our resolution of the merits of the substantive issue presented by the Attorney General, we need not consider whether the PSC erred by considering the Attorney General's arguments barred as untimely.

Affirmed.

ROBERTS v TITAN INSURANCE COMPANY

Docket No. 280776. Submitted November 12, 2008, at Grand Rapids. Decided December 4, 2008, at 9:00 a.m. Vacated 282 Mich App 801.

Kyle Roberts, a minor, by his next friend and mother, Lillian Irwin, brought an action in the Kalamazoo Circuit Court against Titan Insurance Company, seeking personal protection insurance (PIP) benefits for injuries he sustained at age 12 in an automobile accident involving a Ford Explorer owned by Steven Vandenberg, Roberts's and Irwin's landlord and housemate. Roberts had taken the Explorer without permission for a joyride that ended when he hit a tree. Vandenberg had let Irwin use the vehicle for all her needs for more than 30 days before the accident occurred; however, he retained title to the vehicle and did not intend that Irwin have permanent use of the vehicle. Before the accident, Irwin obtained no-fault insurance for her own vehicle, a Jeep, then changed the policy to instead cover a Ford Escort, without informing Titan that the Escort was titled in the name of her 19-year-old son, Vernon Austin, III, or that it was Austin who would be using the Escort. Titan claimed that Roberts was not entitled to PIP benefits under MCL 500.3113(a) because he had taken the Explorer "unlawfully" and also that the insurance policy was void *ab initio* because of Irwin's misrepresentation that she owned the Escort. The court, Gary C. Giguere, Jr., J., granted summary disposition for the defendant, holding that the family member joyriding exception to the application of MCL 500.3113(a), adopted by the Court of Appeals in *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244 (1997), did not apply to this case. Roberts appealed.

The Court of Appeals *held*:

1. MCR 7.215(J)(1) constrains this panel to follow *Butterworth*, which held that MCL 500.3113(a) does not apply to any person who takes a family member's vehicle for joyriding purposes and only operates to exclude coverage if the person had an actual intent to steal the vehicle.

2. Under the facts of this case, Irwin's use of the Explorer qualifies her as an "owner" of the vehicle under MCL 500.3101(2)(h) because she had possessory use of the vehicle for more than 30 days.

3. There is no evidence that Roberts intended to steal the vehicle. Because he was a member of the owner's family joyriding rather than attempting to steal the vehicle, under the holding of *Butterworth*, Roberts did not "unlawfully" take the vehicle for purposes of the exclusion from coverage in MCL 500.3113(a).

4. Were this panel not compelled to follow *Butterworth*, it would, instead, hold that there is no family member joyriding exception to MCL 500.3113(a). A conflict between this case and *Butterworth* must be declared pursuant to MCR 7.215(J)(2).

5. The provision in the insurance contract excluding coverage for injuries sustained by any person using an automobile taken unlawfully must be construed to not apply to a joyriding family member in order for the provision to be compatible with existing public policy.

6. Although the Titan policy was procured through Irwin's intentional misrepresentation of a material fact in the application, the innocent third party doctrine applies here because Roberts was not involved in the misrepresentation. Titan may not deny Roberts coverage on the basis of Irwin's improper actions.

7. There is no requirement that an insured actually own or be the registrant of the vehicle in order to have an insurable interest adequate to support PIP coverage. The fact that Irwin did not have an insurable interest in the Escort does not preclude recovery of PIP benefits.

Reversed and remanded.

HOEKSTRA, P.J., concurred in the result only.

1. INSURANCE — NO-FAULT — WORDS AND PHRASES — OWNERS OF MOTOR VEHICLES.

There may be more than one "owner" of a vehicle for purposes of applying the no-fault automobile insurance act's definition of "owner" (MCL 500.3101[2][h]).

2. INSURANCE — NO-FAULT — WORDS AND PHRASES — OWNERS OF MOTOR VEHICLES — USE OF A MOTOR VEHICLE.

The phrase "having the use" of a motor vehicle for purposes of defining "owner" under the no-fault automobile insurance act means using the vehicle in ways that comport with concepts of ownership; the focus is on the nature of the person's right to use the vehicle; ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or

with the permission of another; it is a regular pattern of unsupervised usage (MCL 500.3101[2][h]).

3. INSURANCE — FRAUD — THIRD PARTIES — INNOCENT THIRD PARTIES.

An intentional misrepresentation by an insured in procuring an insurance policy may bar a claim by the insured who made the misrepresentation, but does not bar the claim of any insured under the policy who is innocent with regard to such misrepresentation.

Jonathan W. Willoughby, PLC (by *Jonathan W. Willoughby*), for the plaintiff.

James, Dark & Brill (by *John C. Fish*) for the defendant.

Before: HOEKSTRA, P.J., and WHITBECK and TALBOT, JJ.

PER CURIAM. In this first-party no-fault automobile insurance action, plaintiff Kyle Roberts, by his next friend and mother, Lillian Irwin, appeals as of right the trial court's order granting defendant Titan Insurance Company (Titan) summary disposition under MCR 2.116(C)(10). We reverse. But, were it not for the statements in the lead opinion in *Priesman v Meridian Mut Ins Co*[1] that were adopted by this Court in *Butterworth Hosp v Farm Bureau Ins Co*,[2] we would affirm. And for this reason, we declare a conflict with *Butterworth*.[3]

I. BASIC FACTS AND PROCEDURAL HISTORY

In June 2005, Roberts, at age 12, was seriously injured when he crashed a Ford Explorer into a tree.

[1] *Priesman v Meridian Mut Ins Co*, 441 Mich 60; 490 NW2d 314 (1992). The lead opinion was signed by three justices; one justice concurred in the result of the lead opinion only; three justices signed a dissenting opinion.

[2] *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997).

[3] MCR 7.215(J)(2).

Roberts was intoxicated at the time of the accident. Following the accident, Roberts spent three weeks in the hospital and required follow-up care for months.

Steven Vandenberg, Roberts's and Irwin's landlord and housemate, was the title owner of the Explorer that Roberts was driving at the time of the accident. Irwin and Roberts moved into Vandenberg's home on or about May 1, 2005; they were looking for a place to live, and Vandenberg needed someone to take care of his dog when he went out of town. There is no dispute that Roberts was not legally or biologically related to Vandenberg. There is also no dispute that Roberts did not have permission to drive the Explorer on the day of the accident.

During his deposition, Vandenberg explained that when Irwin moved in he noticed that there was water spilling out from underneath Irwin's Jeep. According to Vandenberg, it turned out that the water pump was in need of repair. At that time, Vandenberg had three vehicles: the Explorer, a Ford Expedition, and a Jaguar. Because he drove the Expedition "all the time" and did not need to use the Explorer, he offered to let Irwin use the Explorer. Irwin thanked him, and he gave her the keys to the Explorer.

Vandenberg stated, to the best of his knowledge, that from May 2005 until the accident in June 2005, Irwin used the Explorer for all her daily needs. According to Vandenberg, Irwin did not pay him anything for the use of the Explorer, and they had no arrangement for the sale of the Explorer to Irwin. Vandenberg and Irwin also had no agreement regarding how long Irwin would be allowed to use the Explorer, but Vandenberg did not intend that Irwin have "permanent" use of the vehicle. Vandenberg agreed that, during the times that Irwin was not using it, he probably could have used the Explorer anytime that he wanted, but he explained that

he would probably have asked Irwin for permission first "because [he] gave it to her to use." However, he also agreed that Irwin was using the vehicle with his permission and that he could have told her anytime that he did not want her to use the vehicle anymore. Vandenberg admitted that he did not tell his insurance carrier that Irwin was driving the Explorer.

Vandenberg testified that his insurance company "totaled out" the Explorer after the accident, but he was responsible for the $1,000 deductible, which he paid. Irwin agreed to pay back Vandenberg for the deductible, which he told her was only $500, to give her a break after "what she had been through with her son," but she never paid him.

During her deposition, Irwin testified that when Vandenberg gave her the Explorer to use, she felt that she owned it because she drove it all the time, she was the only person who used it, and all her stuff was in it. Irwin explained, "I just took it that it was mine and I could use it. I could go wherever I wanted. If I wanted to go to Georgia, I could go there. I could do anything in the vehicle." Despite her belief that she owned the Explorer, Irwin later admitted that she did not believe that she had the right to sell the vehicle because she knew she was not the title owner. Irwin confirmed that she did not pay Vandenberg for her use of the Explorer, nor was there any agreement that she pay him for her use. Irwin also admitted that Vandenberg never told her that she owned the Explorer. But, despite confirming that the Explorer was titled in Vandenberg's name and that he paid the insurance for it, Irwin stated that she did not believe Vandenberg had the right to tell her she could no longer use the vehicle because he "gave it to" her. Irwin stated that she paid all the general mainte-

nance costs for the Explorer, including gas, oil, transmission fluid, and windshield washer fluid. Irwin also stated that if the Explorer had broken down, she would have paid for the repairs.

On further questioning, Irwin admitted that she lied to a Titan agent who interviewed her after the accident. When the agent asked her who had use of the Explorer before the accident, Irwin told him that Vandenberg had sole use of the vehicle. Indeed, she specifically denied ever driving the Explorer. Irwin explained that she lied because she did not want Vandenberg to "get in any trouble." However, she could not specify what kind of trouble she was worried about. Irwin confirmed that she agreed to pay Vandenberg $500 for the deductible, and although she planned to do so, she had not yet paid him. Irwin confirmed that she also lied to the Titan agent when she told him that she had already paid Vandenberg $500 for the deductible.

Roberts testified that when he took the Explorer on the night of the accident, he believed that it belonged to Irwin because "[s]he was always driving it around, had everything in it." Roberts stated that he had never driven any vehicle before, and he admitted that neither Irwin nor Vandenberg gave him permission to drive the Explorer on the night in question. Roberts also admitted that, after Irwin and Vandenberg had gone to bed on the night of the accident, he drank some tequila that he found in the kitchen cupboard. Roberts explained that after drinking the tequila he sat down to watch television and then noticed the car keys in the mesh pocket of Irwin's backpack, which was on the kitchen counter. Roberts could not explain exactly why he took the car. He stated that he just felt like going for a drive.

Roberts stated that the next thing he remembered after pulling out of the driveway was waking up in the hospital.

Vandenberg testified that he did not know how Roberts obtained the keys to the Explorer on the night of the accident. Vandenberg stated that he had a spare set of keys for the Explorer that he kept "locked up," and that he did not know where Irwin kept the set of keys that he had given to her. Vandenberg also denied knowing where Roberts obtained the alcohol that he consumed that night, but he admitted that he noticed that some alcohol was missing from his home after the accident.

Although she stated that she often let Roberts start up the Explorer in the mornings, Irwin confirmed that she did not give Roberts permission to drive the Explorer on the night of the accident or at any other time before the accident. Irwin stated that she did not know that Roberts had taken the Explorer on the night of the accident until the police came to the house in the morning. Irwin stated that she normally kept her car keys in her backpack, her purse, or on a set of hooks near the back door. However, she did not know where she put the keys on the night of the accident.

At the time of the accident, Irwin was covered by a no-fault automobile insurance policy that Titan issued to her in March 2005. Irwin had initially purchased the policy to cover a Jeep Grand Cherokee, but in April 2005, she changed the policy to instead cover a Ford Escort. When she applied for the Escort coverage, Irwin provided Titan with a copy of the previous owner's title without any of the buyer information filled in. During her deposition, Irwin first claimed that the title to the Escort was in her

name. However, Irwin later revealed that she did not own it and had never even driven the Escort at the time she sought the insurance coverage. Irwin also confirmed that the Escort was never stored at her house. Irwin explained that the Escort was for her son Vernon Austin, III. Irwin admitted during her deposition that she did not tell the Titan agent that she would not be using the Escort, or that Austin would be using it. However, she clarified that the agent did not ask her who would be using the car. A title search later revealed that the Escort was in fact titled in Austin's name. Irwin stated that she insured the Escort in her name because Austin needed insurance and he was not responsible enough to obtain it for himself.

Citing MCL 500.3113(a), Titan denied Roberts personal protection insurance (PIP) benefits on the ground that Roberts had unlawfully taken the Explorer. And in June 2006, Roberts filed a complaint, alleging that Titan breached the insurance policy by denying Roberts recovery. Titan then moved for summary disposition under MCR 2.116(C)(10), arguing that Roberts's claim was barred because (1) Roberts unlawfully took the Explorer, and (2) the insurance policy issued by Titan was void *ab initio* because of Irwin's misrepresentation that she owned the Escort. Roberts responded, arguing that the trial court should (1) deny Titan's motion for summary disposition because there were genuine issues of material fact regarding whether Roberts "unlawfully" took the Explorer in light of the family member joyriding exception to MCL 500.3113(a) and (2) grant partial summary disposition in his favor instead with regard to Titan's misrepresentation defense because there was no genuine issue of material fact that Roberts was an innocent third party to Irwin's alleged misrepresentation.

After hearing oral arguments on the motion, the trial court issued its written opinion and order in which it concluded that, as a matter of law, the family member joyriding exception to MCL 500.3113(a) was not binding in this case and that, therefore, the statute barred Roberts's recovery. The trial court's full analysis consisted of the following paragraph:

> Without question [Roberts] unlawfully took the Explorer. [Roberts] did not have a reasonable belief that he was entitled to take and use the vehicle. The family joyriding exception to MCL 500.3113(a) as stated by the *Priesman* court is not binding on this court or case. Recovery is barred pursuant to MCL 500.3113(a) and the language contained in [Titan's] policy. As such, it is not necessary for this court to address [Titan's] misrepresentation argument, whether Irwin qualified as an owner, whether Irwin had an insurable interest, whether the innocent third party doctrine applies, or whether [Titan's] policy bars recovery.

Accordingly, the trial court granted Titan's motion for summary disposition and denied Roberts's motion for partial summary disposition. Roberts now appeals.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is, therefore, entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[4] The trial court must consider all the documentary evidence in the light

[4] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

most favorable to the nonmoving party.[5] We review de novo the trial court's ruling on a motion for summary disposition.[6] Construction of unambiguous contract language and interpretation of statutes are questions of law that this Court also reviews de novo.[7]

B. *PRIESMAN* AND MCL 500.3113(a)

1. MCL 500.3113

Section 3113 of the no-fault insurance act[8] provides, in pertinent part, as follows:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
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> (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.[9]

Thus, under the plain language of the statute, if a person is injured while using a vehicle that he or she took unlawfully, that person is not entitled to PIP benefits. And, under the plain language of the statute, the only exception to this exclusion is where the person had a reasonable belief that he or she was entitled to take and use the vehicle.

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[5] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[6] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[7] *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002); *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997); *Hafner v Detroit Automobile Inter-Ins Exch*, 176 Mich App 151, 156; 438 NW2d 891 (1989).

[8] MCL 500.3101 *et seq*.

[9] MCL 500.3113(a).

2. *PRIESMAN*

In *Priesman v Meridian Mut Ins Co*,[10] the Michigan Supreme Court considered whether "an underage, unlicensed driver injured while driving his mother's automobile without her knowledge or consent may recover medical benefits from the no-fault insurer of her automobile." Similar to the facts in the present case, in *Priesman* a 14-year-old boy sustained serious bodily injuries from an automobile accident after he took his mother's car without her permission during the night while she was asleep.[11] Citing MCL 500.3113(a), the insurer argued that the boy was not entitled to no-fault medical benefits because he was using his mother's car unlawfully at the time of the accident.[12] The insurer contended that the boy's use of the vehicle was " 'unlawful' " because, under Michigan law, it is a misdemeanor to take or use a vehicle " 'without authority.' "[13]

After recognizing that the no-fault act does not define the term "taken unlawfully," three members of the Court stated in the lead opinion that MCL 500.3113(a) did not apply to "joyriding" family members, who most commonly were teenagers driving their parents' cars without permission.[14] In so stating they first noted that the Uniform Motor Vehicle Accident Reparations Act (UMVARA), which was a model for Michigan's no-fault act, excluded from coverage persons injured while driving a stolen vehicle, *unless* that person was covered under an insurance contract issued to that person, his or her spouse, or a relative living in the

[10] *Priesman*, *supra* at 61 (opinion by LEVIN, J.).

[11] *Id*. at 62.

[12] *Id*. at 62-63.

[13] *Id*. at 63, citing MCL 750.414.

[14] *Id*. at 63, 68.

same household.[15] Also acknowledging this provision, the insurer argued that by substituting " 'taken unlawfully' " for " 'converts' " the Michigan Legislature intended to exclude not only thieves who intend to steal the vehicles, but also joyriders.[16] The lead opinion rejected this argument, stating that the Legislature's modification of the UMVARA model merely showed its intent to deny coverage to any thief regardless of his or her insurance coverage, "not necessarily to except joyriders from coverage."[17] In other words, they wrote, "the Legislature did not intend any substantial difference in scope or meaning from the prototypical UMVARA concept excepting thieves from no-fault coverage . . . ."[18] They reasoned that the Legislature's intent could not have been to deny coverage to joyriding family members, noting that teen joyriding was a common occurrence: "Legislators generally are also parents and sometimes grandparents. Some may have had experience with children, grandchildren, nephews, nieces, and children of friends who have used a family vehicle without permission. Some may have themselves driven a family vehicle without permission."[19] Accordingly, the lead opinion favored a judicially created family member joyriding exception to MCL 500.3113(a).

Despite the fact that a majority of the *Priesman* Court did not agree on the existence of this joyriding

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[15] *Id*. at 66, citing § 21 of the UMVARA, 14 ULA 87-88 ("[A] person who converts a motor vehicle is disqualified from basic or added reparation benefits, including benefits otherwise due him as a survivor, from any source *other than an insurance contract under which the converter is a basic or added reparation insured* . . . ." [Emphasis added.]), and § 1(i) and (ii) of the UMVARA, 14 ULA 42.

[16] *Priesman, supra* at 67 (opinion by LEVIN, J.).

[17] *Id*.

[18] *Id*. at 67-68.

[19] *Id*. at 68.

exception, Roberts argues that the trial court erred in ruling as a matter of law that the exception was not binding in this case. Roberts acknowledges that *Priesman* itself is not precedentially binding.[20] However, Roberts argues that the rationale of the lead opinion in *Priesman* is binding because it has been adopted in subsequent decisions of this Court.

In *Butterworth Hosp v Farm Bureau Ins Co*,[21] this Court recognized that *Priesman* was not binding precedent and even commented that "any joyriding exception seems to be in derogation of the clear language of the statutes." Nonetheless, this Court felt "compelled" to follow the reasoning of the lead opinion of *Priesman* and extended the exception to adult family members from another household who take a relative's vehicle joyriding.[22] In doing so, this Court clarified that MCL 500.3113(a) did not apply to any person who takes a family member's vehicle for joyriding purposes; rather, the statute only operated to exclude a person from coverage if he or she had an actual intent to steal the vehicle.[23]

In *Mester v State Farm Mut Ins Co*,[24] three girls were skipping school together and took a stranger's truck that they eventually crashed during a police chase. The plaintiff argued that the joyriding exception should be extended to anyone who merely joyrides without intent to steal.[25] This Court rejected the plaintiff's argument,

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[20] See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 58; 664 NW2d 776 (2003).

[21] *Butterworth Hosp*, *supra* at 248, 249 n 2.

[22] *Id*. at 248-249.

[23] *Id*. 249-250.

[24] *Mester v State Farm Mut Ins Co*, 235 Mich App 84, 85-86; 596 NW2d 205 (1999).

[25] *Id*. at 88.

noting that, by statute,[26] "[a]n unlawful taking does not require an intent to permanently deprive the owner of the vehicle," and reasoning that "[h]ad the Legislature intended to exempt from subsection 3113(a) all joyriding incidents, it would have chosen a different term than 'unlawful taking,' such as 'steal' or 'permanently deprive.' "[27] This Court then explained that the lead opinion in *Priesman* "recognized a joyriding exception . . . not because joyriding does not involve an unlawful taking, but only because of special considerations attendant to the joyriding use of a family vehicle by a family member."[28] This Court then concluded that those "special considerations" did not "warrant expansion of the exception beyond the family context."[29]

As Roberts concedes and this Court has repeatedly acknowledged, the lead opinion in *Priesman* is not binding precedent because it was adopted by only three of the seven justices.[30] Further, in urging us to disregard the *Priesman* decision, Titan points out that in recent years the Michigan Supreme Court has more strictly enforced the dictate that "[s]tatutory—or contractual—language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."[31] Accordingly, the Court has stated that "[a]lthough stare decisis is generally ' "the preferred course," ' [the Court] will nevertheless depart from erroneous precedent 'when governing decisions

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[26] Citing MCL 750.413.

[27] *Mester*, *supra* at 88.

[28] *Id*.

[29] *Id*. See also *Allen v State Farm Mut Automobile Ins Co*, 268 Mich App 342, 346; 708 NW2d 131 (2005) (declining to extend the exception to nonfamily members who reside in same household as the vehicle owner).

[30] See *Mester*, *supra* at 87; *Butterworth Hosp*, *supra* at 248.

[31] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005).

are unworkable or are badly reasoned.' "[32] Titan therefore contends that the current membership of the Supreme Court would likely conclude that the justices signing the lead opinion in *Priesman* sought improperly to legislate from the bench and judicially create a joyriding exception when the plain language of MCL 500.3113(a) shows no such intent.

Although we are persuaded by Titan's position, we cannot render decisions on the basis of speculation regarding what the current membership of the Supreme Court may decide. As stated, this Court in *Butterworth Hosp* specifically adopted the reasoning stated in the lead opinion in *Priesman*, and we are now bound by court rule to follow that decision.[33] However, were we not so bound to follow the *Butterworth* decision, we would instead follow Justice GRIFFIN's dissent in *Priesman*, in which he concluded that, by creating the joyriding exception, the lead opinion improperly "depart[ed] from the clear and unambiguous language of § 3113(a) . . . ."[34] As Justice GRIFFIN stated, although there may be "emotional appeal" to the rationale of the lead opinion that the legislators could not have meant to exclude coverage to young, joyriding family members given their own likely experience with that common occurrence, such an exception is not supported by the plain, unambiguous language of the statute.[35]

3. APPLYING THE FAMILY MEMBER JOYRIDING EXCEPTION

(a) FAMILY MEMBER'S VEHICLE

Having concluded that the family member joyriding

[32] *Id*. at 584, quoting *Robinson v Detroit*, 462 Mich 439, 463-464; 613 NW2d 307 (2000) (citations omitted).

[33] See MCR 7.215(J)(1).

[34] *Priesman*, *supra* at 69 (GRIFFIN, J., dissenting).

[35] *Id*. at 73.

exception is binding on this Court, we now turn to application of that exception to the present case. Therefore, we must determine whether Roberts's conduct falls within that scope of that exception; that is, whether Roberts was joyriding in a family member's vehicle.

Roberts concedes that the vehicle was titled to and owned by Vandenberg and that, therefore, the joyriding exception would seem to not apply.[36] However, Roberts argues that Irwin's use of the vehicle qualified her as an "owner" of the vehicle sufficient to fall within the scope of the exception.

The no-fault insurance act defines the term "owner" as:

> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
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> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.[37]

Here, there is no dispute that Irwin did not hold legal title to the Explorer; Vandenberg was the title owner. Therefore, subsection *ii* does not apply. Further, there is no dispute that Irwin was not purchasing the vehicle under an installment sale contract. Therefore, subsection *iii* does not apply. Accordingly, we must determine if Irwin's use of the Explorer for a period greater than

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[36] See *Allen*, *supra* at 346.

[37] MCL 500.3101(2)(h). We note that MCL 500.3101 was amended, effective July 17, 2008, redesignating the previous subsection 3101(2)(g) to (2)(h). 2008 PA 241. However, the substance of the section remains unchanged.

30 days, as referred to in subsection *i*, operated to classify her as an "owner" of the vehicle.

We first note that in applying the no-fault act's definition of "owner," this Court has recognized that there may be more than one "owner" of a vehicle.[38] For example, this Court has held that both a lessee and the legal titleholder could be owners under the no-fault act's definition of "owner," thereby requiring them both to maintain security for payment of benefits under PIP insurance.[39]

Where there is no lease agreement, " 'having the use' of a motor vehicle for purposes of defining 'owner,' . . . , means using the vehicle in ways that comport with concepts of ownership."[40] The focus must be on the nature of the person's right to use the vehicle.[41] "[O]wnership follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another."[42] It is a "regular pattern of unsupervised usage" rather than "spotty and exceptional" usage that will support a finding of ownership.[43]

Here, there is no dispute that Vandenberg gave the Explorer to Irwin to use because her Jeep broke down right after she moved into his house and that thereafter she had exclusive use of that vehicle. As stated, there was no dispute in the record that Irwin used the vehicle for all her daily needs, and Vandenberg testified that if

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[38] *Integral Ins Co v Maersk Container Service Co*, *Inc,* 206 Mich App 325, 332; 520 NW2d 656 (1994).

[39] *Id*., citing MCL 500.3101(1).

[40] *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999).

[41] *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 530; 676 NW2d 616 (2004).

[42] *Ardt*, *supra* at 691 (emphasis in original).

[43] *Id*.

he had wanted to use the Explorer, he probably would have asked Irwin for permission first "because [he] gave it to her to use." Therefore, we conclude that Irwin's use of the car comports with the concepts of ownership. Further, the record indicates that Irwin had possessory use of the Explorer from approximately March 1, 2005, until June 14, 2005. Therefore, the record establishes that Irwin had use of the vehicle for a period greater than 30 days. Accordingly, viewing the evidence in the light most favorable to Roberts, we conclude that there was no question of fact concerning Irwin's ownership.[44]

(b) ROBERTS'S INTENT

In *Butterworth*, this Court explained that MCL 500.3113(a) "does not apply to cases where the person taking the vehicle unlawfully is a family member doing so without the intent to steal but, instead, doing so for joyriding purposes."[45] Here, there was no evidence that Roberts intended to steal the vehicle. According to his testimony, after becoming intoxicated, he simply decided to take the vehicle for a drive.

Therefore, because Roberts was a family member joyriding rather than attempting to steal the car, under

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[44] See *Botsford Gen Hosp v Citizens Ins Co*, 195 Mich App 127, 134; 489 NW2d 137 (1992).

[45] *Butterworth*, *supra* at 249. See MCL 750.413 ("Any person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony . . . ."); *Mester*, *supra* at 88 ("An unlawful taking does not require an intent to permanently deprive the owner of the vehicle . . . ."). See also MCL 750.414 ("Any person who takes or uses without authority any motor vehicle without intent to steal the same . . . is guilty of a misdemeanor . . . ."); *Landon v Titan Ins Co*, 251 Mich App 633, 644; 651 NW2d 93 (2002), quoting *People v Laur*, 128 Mich App 453, 455; 340 NW2d 655 (1983) (" 'To be convicted of this offense, a defendant must have intended to take or use the vehicle, knowing that he had no authority to do so.' ").

the precedent that *Butterworth* set by adopting the reasoning of the lead opinion in *Priesman*, he did not "unlawfully" take the car for purposes of MCL 500.3113(a) of the no-fault act and is thus not excluded from coverage under that provision.

C. THE POLICY LANGUAGE

When presented with a contractual dispute, a court must read the contract as a whole with a view to ascertaining the intention of the parties, determining what the parties' agreement is, and enforcing it.[46] Absent ambiguity, a contract must be construed to adhere to its plain and ordinary meaning.[47] Technical and constrained constructions are to be avoided.[48]

> It is a cardinal principle of construction that a contract is to be construed as a whole; that all its parts are to be harmonized so far as reasonably possible; that every word in it is to be given effect, if possible; and that no part is to be taken as eliminated or stricken by some other part unless such a result is fairly inescapable.
>
> . . . Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.[49]

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[46] *Detroit Trust Co v Howenstein,* 273 Mich 309, 313; 262 NW 920 (1935); *Whitaker v Citizens Ins Co*, 190 Mich App 436, 439; 476 NW2d 161 (1991). *Perry v Sied*, 461 Mich 680, 689 & n 10; 611 NW2d 516 (2000), citing 3 Corbin, Contracts, § 549, pp 183-186 (contracts are to be interpreted and their legal effects determined as a whole).

[47] *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998).

[48] *Bianchi v Automobile Club of Michigan*, 437 Mich 65, 71 n 1; 467 NW2d 17 (1991).

[49] *Laevin v St Vincent de Paul Society*, 323 Mich 607, 609-610; 36 NW2d 163 (1949) (citations and quotation marks omitted).

"[C]lear and specific exclusions in an insurance policy should be given effect."[50]

1. UNLAWFULLY TAKEN VEHICLE

Under the terms of Irwin's Titan insurance policy, "coverage does **not** apply to **bodily injury** sustained by: 1. Any person using an **auto** taken unlawfully." (Emphasis in original.) Relying on this provision, Titan argues that the insurance policy alone clearly precludes coverage for Roberts's claims. However, "[t]o the degree that the contract is in conflict with the statute, it is contrary to public policy and, therefore, invalid."[51] But "contracting parties are assumed to want their contract to be valid and enforceable," and "we are obligated to construe contracts that are potentially in conflict with a statute, and thus void as against public policy, where reasonably possible, to harmonize them with the statute."[52] Therefore, preferring a construction of the contract that renders it legal and enforceable, we construe this contract in a manner that renders it compatible with the existing public policy by concluding that the exclusion does not apply to a joyriding family member.[53]

2. MISREPRESENTATION

Although the trial court did not rule on the issue, Roberts argues that Titan was not entitled to void the insurance policy and therefore deny Roberts benefits on the basis of Irwin's alleged misrepresentations. Titan

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[50] *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 90; 578 NW2d 326 (1998).

[51] *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 601; 648 NW2d 591 (2002).

[52] *Id*. at 599.

[53] See *id*.

argues that Irwin fraudulently obtained insurance coverage by misrepresenting that she owned the Escort and, therefore, the insurance contract was void *ab initio*.

Irwin's insurance policy excludes coverage when the policy is obtained by fraud. Specifically, the policy states as follows:

> We do not provide coverage for any insured who has made fraudulent statements or engaged in fraudulent conduct in obtaining or maintaining this policy or concerning any **accident** or **loss** for which coverage is sought under this policy.

Further, it is a well-established rule that "[w]here a policy of insurance is procured through the insured's intentional misrepresentation of a material fact in the application for insurance, and the person seeking to collect the no-fault benefits is the same person who procured the policy of insurance through fraud, an insurer may rescind an insurance policy and declare it void *ab initio*."[54]

Here, there is no dispute that Irwin lied to Titan when she said that she owned the Escort, which was actually owned and used by her son Vernon. And Irwin's misrepresentation was material to the risk insured because Titan would have increased the premium had it known the truth about the vehicle's ownership and usage. Karen Gines, an employee in Titan's underwriting department, attested that

> [t]he risk Titan assumed by issuing the policy to Lillian Irwin for the 1995 Ford Escort was substantially less than the actual risk assumed due to the car being owned by, in the possession of, and driven by Ms. Irwin's 19-year-old

[54] *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 9; 369 NW2d 243 (1985).

> son, Vernon Austin, III. The risk of insuring a 19-year-old male is significantly greater than the risk of insuring a 36-year-old female.

Therefore, the Titan policy was procured through Irwin's intentional misrepresentation of a material fact in the application for insurance.

However, an insurer may not void a policy of insurance *ab initio* where an innocent third party is affected.[55] Therefore, " 'only the claim of an insured who has committed the fraud' will be barred, leaving unaffected 'the claim of any insured under the policy who is innocent of fraud.' "[56] Titan argues that this innocent third party doctrine does not apply in this case because, given that Roberts is a minor, it is Irwin who is actually responsible for paying his medical expenses and therefore she is the person actually seeking to collect any insurance benefits.

However, caselaw demonstrates that the innocent third party doctrine ensures coverage for any person who is innocent of participation in the alleged fraud. For example in *Darnell v Auto-Owners Ins Co*, this Court held that the plaintiff was entitled to recover benefits where his wife, not the plaintiff, made the alleged misrepresentations.[57] In contrast, in *Hammoud v Metro Prop & Cas Ins Co*, this Court held that the plaintiff was not entitled to recover benefits because he was actively involved in defrauding the insurer by allowing his older brother to obtain the insurance policy by misrepresenting the plaintiff's status as a driver of

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[55] *Id*. at 10. See also *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997).

[56] *Darnell*, *supra* at 10, quoting *Morgan v Cincinnati Ins Co*, 411 Mich 267, 277; 307 NW2d 53 (1981).

[57] *Darnell, supra* at 10.

the vehicle.[58] Therefore, the relevant inquiry is whether the injured third party was innocent with respect to the misrepresentation made to the insurance company, or was actively involved in defrauding the insurer.

Here, it was Irwin, not Roberts, who is alleged to have misrepresented facts on the application for insurance. Consequently, while we certainly do not condone Irwin's actions, the fact remains that Roberts made no misrepresentation and coverage may not be denied to him on the basis of his mother's improper actions.

3. INSURABLE INTEREST

Titan also argues that Irwin did not have an insurable interest in the Escort; thus, the policy should be void. However, "there is no requirement that an insured actually own or be the registrant of a vehicle in order to have an insurable interest adequate to support PIP coverage."[59]

> [T]here is no requirement that there be an insurable interest in a specific automobile since an insurer is liable for personal protection benefits to its insured regardless of whether or not the vehicle named in the policy is involved in the accident. A person obviously has an insurable interest in his own health and well-being. This is the insurable interest which entitles persons to personal protection benefits regardless of whether a covered vehicle is involved.[60]

Therefore, the fact that Irwin may not have had an insurable interest in the Escort does not preclude recovery of PIP benefits.

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[58] *Hammoud*, *supra* at 488-489.

[59] *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 725; 635 NW2d 52 (2001).

[60] *Madar v League Gen Ins Co*, 152 Mich App 734, 739; 394 NW2d 90 (1986).

III. CONCLUSION

Despite our disagreement with *Butterworth*'s adoption of the *Priesman* lead opinion's reasoning regarding a family joyriding exception, it is controlling, and we must follow it as binding precedent.[61] We therefore reverse the trial court's grant of summary disposition in favor of Titan. In the absence of *Butterworth*, we would follow Justice GRIFFIN's dissent in *Priesman*, and we therefore declare a conflict between the present case and *Butterworth*.[62]

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, P.J. *(concurring).* I concur in the result only.

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[61] MCR 7.215(J)(1).

[62] MCR 7.215(J)(2).

HOLMES v HOLMES

Docket No. 276470. Submitted October 14, 2008, at Grand Rapids. Decided December 4, 2008, at 9:05 a.m. Leave to appeal sought.

The plaintiff, Elizabeth S. Holmes, obtained a divorce from the defendant, Richard E. Holmes, Jr., in the Kent Circuit Court in 1996. The divorce judgment incorporated an agreement between the parties giving them joint legal custody of their children. The agreement also required the defendant to pay the plaintiff child support, including a percentage of any net bonus he received. Although the shared economic responsibility formula (SERF) might have applied, the parties determined the amount of child support through a calculation that used the SERF amount as only one component. Over the years, the parties moved on multiple occasions to modify the support arrangements. Eventually, the defendant sought a modification that applied the SERF and also reduced the percentage of his bonus payable as child support. The plaintiff filed a cross-motion to modify child support, alleging a change of circumstances. The court, Patricia D. Gardner, J., referred the matter to a mediator, whose recommendations included use of the SERF and a reduction of the percentage of the defendant's bonus payable as child support. The plaintiff accepted the recommendation regarding the monthly support obligation, but rejected the recommendation concerning the bonus. Following an evidentiary hearing regarding the modification of the bonus percentage, the court applied the SERF to the bonus and accepted the reduced percentage recommended by the mediator. The plaintiff appealed by delayed leave granted.

The Court of Appeals *held*:

1. The trial court did not err by concluding that a change of circumstances warranted modifying the defendant's monthly support obligation. The plaintiff alleged a change of circumstances in her cross-motion and stipulated acceptance of the mediator's recommendation regarding the monthly support amount.

2. The trial court erred by finding that it lacked the power to enforce the bonus provision in the agreement. Trial courts are obligated to use the guidelines set forth in the child support formula manual when fashioning child support orders. Because the guidelines set forth a parent's minimum support obligation,

however, a voluntarily assumed obligation to pay an amount that exceeds the minimum is not inherently objectionable. A contract enhancing a parent's child support obligation should be enforced absent a compelling reason to forbear enforcement. Continued enforcement of the original bonus provision benefits the children without violating the trial court's inherent ability to modify the child support amount if circumstances changed substantially or the support amount qualified as unjust or inappropriate under MCL 552.605(2)(d).

3. The language of the parties' agreement is clear and unambiguous. The bonus provision contains definite terms regarding its duration and lacks any reference to future adjustments or modifications. The absence of a review provision regarding the bonus percentage indicates that the parties did not intend that the percentage be modifiable. While a circuit court has the power to modify a child support award, it may not ignore an unambiguous contractual provision regarding child support.

Reversed and remanded for further proceedings.

PARENT AND CHILD — CHILD SUPPORT — MODIFICATION OF CHILD SUPPORT AWARDS.

An agreement that enhances a parent's child support obligation beyond the minimum amount required under the child support formula should be enforced absent a compelling reason to forbear enforcement.

Steven J. Vander Ark for the plaintiff.

Holmes & Wiseley, P.C. (by *Aaron D. Wiseley*), for the defendant.

Before: BANDSTRA, P.J., and BECKERING and GLEICHER, JJ.

GLEICHER, J. In this dispute regarding child support, plaintiff appeals by delayed leave granted a circuit court order granting defendant's motion to modify his child support obligation. We reverse and remand.

I. FACTS AND PROCEEDINGS

The parties married in 1988 and consented to the entry of a divorce judgment on July 15, 1996. The

parties, who are both attorneys, have two minor children. At that time of the divorce, plaintiff practiced in a small Grand Rapids law firm. She now serves as the president of her family's construction business and no longer practices law. Defendant is a partner in a large, statewide law firm.

The parties' consent judgment of divorce incorporated a document entitled "Alimony, Custody, Child Support, Parenting Time, and Property Settlement Contract" (the contract). The contract provided for joint legal custody of the children, with plaintiff receiving physical custody. Defendant's parenting time consisted of 12 overnight visits a month, or approximately 164 days a year with other vacation times included. Paragraph 7 of the contract, entitled "Child Support," is the disputed portion at the center of this appeal. It provides:

> Husband shall pay child support in the amount of One Thousand, Two Hundred Sixty-three ($1,263.00) Dollars per month (see attached calculations), which includes his portion of the payment for the children's nanny. *Further, Husband shall pay twenty-five percent (25%) of any net bonus he receives in any given year as additional child support. When the oldest child attains the age of 18 or completes high school, whichever event occurs last, this payment shall be reduced to fifteen percent (15%) of his net bonus, and shall terminate upon the youngest child's attaining the age of 18 or graduating from high school, whichever last occurs.* [Emphasis supplied.]

The parties agree that they calculated defendant's $1,263 monthly child support obligation by adding together the amount that would have been due under the standard child support guidelines in the Michigan Child Support Formula Manual (MCSFM) if plaintiff had been given sole custody ($1,697.81) and the amount calculated under the shared economic responsibility

formula (SERF)[1] ($828.25) and then dividing by two.[2] When they negotiated the contract, the parties recognized that defendant's substantial parenting time would potentially entitle him to application of the SERF. They agreed on the compromise embodied in the contract to avoid a protracted courtroom battle regarding both parenting time and child support.

Paragraph 8 of the contract, entitled "Additional Child Support Provision," addressed future child support modification:

> All child support shall be paid through Kent County Friend of the Court and shall be subject to all Friend of the Court regulations and supervisory fees. *Husband waives the right to assert shared economic participation and agrees not to introduce the shared economic concept into the support calculation for the minor children for a ten-year period*. Wife agrees that as long as Husband exercises the parenting time specified in this Agreement, the same shall be effected in the support calculation.
>
> Husband and Wife agree that support shall remain fixed for one year after the entry of the Judgment of Divorce, before it can be reviewed, and that support will be reviewed only in the event that either Husband or Wife is receiving greater compensation than at the time of the entry of the Judgment of Divorce. In no event shall child support be reduced, unless Husband is completely unemployed on a non-voluntary basis, or unless Wife's earnings increase. [Emphasis supplied.]

In 1997, the parties filed competing motions to modify defendant's monthly child support payments.

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[1] This methodology appears in 2004 MCSF 3.05.

[2] The "attached calculations" referred to in ¶ 7 of the contract were not attached to the divorce judgment or the copy of the contract filed with the circuit court. The parties clashed regarding the formula for many years. But their current positions remain consistent with the simple mathematics described here.

Plaintiff sought a significant increase, alleging that her income declined when her law firm closed its doors and she became self-employed. Defendant advocated application of the SERF, averring that because he had 14 parenting time days a month, the SERF was more equitable. Plaintiff countered that in the contract defendant had "agreed not to assert shared economic responsibility for a period of ten years."

The circuit court increased defendant's child support payment to $1,391 a month, observing as follows in its written opinion and order:

> The issue is complicated by the fact that the judgment incorporates by reference a document entitled "alimony, custody, child support, parenting time, and property settlement contract" entered by and between the parties under date of March 16, 1996. This rather singular document addresses child support in paragraphs 7 and 8 on pages 3 and 4. Paragraph 7 establishes child support for the 2 minor children of the parties at $1263.00 per month, including child care, which figure is ostensibly based upon "attached calculations." Lamentably however, no such calculations are in fact attached to the document.

The circuit court calculated the $1,391 monthly figure through a formula of its own creation, which was more complex than simply adding the standard guidelines and SERF numbers, then dividing the total by two. The circuit court further ordered that no child support review would occur for 24 months, absent an "extraordinary change in circumstances."

On September 28, 2001, defendant filed a motion "for child support calculation pursuant to judgment of divorce." He requested that the newly assigned circuit court judge reconsider the previous judge's calculation method and instead calculate the support obligation by combining the standard guidelines amount with the SERF amount and dividing by two. Plaintiff responded

that the previously employed method constituted the law of the case. The parties also argued regarding whether the calculation would be made using defendant's "base salary" or his "income." The circuit court ruled that the parties had intended to use the formula advocated by defendant. In December 2002, the parties stipulated a monthly child support payment of $1,383.[3] Defendant continued to pay 25 percent of his net bonus as child support.

During the 10-year period described in ¶ 8 of the contract, the parties fought several contentious custody battles and filed multiple motions seeking child support modification.[4] Notably, neither party challenged the portion of the 1996 contract addressing the percentage of defendant's bonus to be paid as child support. Defendant consistently paid 25 percent of his net bonuses as child support, which in some years represented substantial, six-figure sums.

Shortly before the 10-year anniversary of the divorce judgment, defendant moved for modification of his child support obligation. Defendant contended that he could now introduce the "shared economic concept" because the 10-year period of forbearance specified in the contract would soon expire. Defendant invoked the following contract provision: "Husband waives the right to assert shared economic participation and agrees not to introduce the shared economic concept into the support calculation for the minor children for a ten-year period." Defendant averred that he had custody of the

[3] Plaintiff filed a delayed application for leave to appeal these rulings, and on May 8, 2003, this Court denied the application for lack of merit in the grounds presented. *Holmes v Holmes*, unpublished order of the Court of Appeals (Docket No. 246548).

[4] A 2003 custody battle also resulted in an appeal to this Court. *Holmes v Holmes*, unpublished order of the Court of Appeals, entered April 1, 2003 (Docket No. 247574).

children for 172 days a year and that the court thus had to apply the SERF. He sought a reduction of his support obligation to $636 a month, which constituted 4 percent of his average monthly income, and a commensurate reduction in the amount of the support payment deducted from his net bonus, from 25 percent to 4 percent.

Plaintiff responded that no basis existed for modifying defendant's support obligation because defendant had failed to show a "change in circumstances." Plaintiff further argued that the bonus percentage had been established in the contract and could not be modified. Plaintiff calculated that under the SERF, defendant would pay $1,134 a month and under the straight guidelines formula, he would pay $2,076.30 each month.

The circuit court referred the matter to the Friend of the Court, explaining as follows:

> The Court does find that there has been a change in circumstances presented.
>
> I am satisfied that having the ten years lapse is a basis to re-evaluate appropriate support for the two children.
>
> I'm also satisfied that it's been two years since the last review of child support.
>
> And, I'm further satisfied that based on the allegations set forth within both briefs, that there's a change in the income of both parties. And, also that the overnight stays which have been kept track by both parties in copious and voluminous notations, deserves review.

On March 31, 2006, plaintiff filed a cross-motion for modification of child support, alleging a change of circumstances that included defendant's failure to use all of his parenting time and an increase in defendant's income. On April 14, 2006, the circuit court referred the matter "for review and a recommendation to a mediator selected and agreed upon by the parties." On October 2,

2006, mediator David C. Sarnacki issued his report and recommendations, which included the following:

> 39. In this case, the parties' original agreement included a regular monthly support amount and a provision for additional child support in the amount of 25% of any net bonus. The 1996 support calculations showed that the regular monthly child support obligation was about 25.4% of Richard's net income.
>
> 40. Richard and his attorney (who calculated the 1996 obligation) contend that the 25% figure was deliberately set based on the percentage of obligation to net income. Elizabeth contends that she was never told this in 1996 and that she did not know how Richard selected the 25%. She merely agreed to his proposal because she knew there was a potential for large bonus income.
>
> 41. As indicated above, the method for providing additional support in the form of a percentage of net bonus income is not surprising. In fact, the figure (25%) bears far too much similarity to the actual ratio (25.4%) to be a coincidence. If there was something shocking about the percentage or including it within the child support obligation, Elizabeth's attorney—an experienced and respected divorce attorney—would have recognized it and it could have been dealt with in 1996.
>
> 42. Despite Elizabeth's contention that the bonus percentage was separate and distinct, it was included in the child support provisions, which are modifiable by law. That percentage served the parties well for 10 years. Now, with the entire obligation under review, there is no reason to ignore the new ratio of obligation to net income. The bonus percentage should reflect the child support obligation as modified.
>
> 43. **RECOMMENDATIONS**: Based upon all the information provided to this evaluator, I submit the following recommendations to this Court:
>
> 44. The effective date for modification is March 19, 2006.

45. Richard's income is $177,400.00 ($14,783.33/month).

46. Elizabeth's income is $80,425.00 ($6,702.08/month).

47. Richard's number of overnights for purposes of the Formula is 157.

48. The formula to be used is SERF.

49. The net bonus percentage is modified in accordance with the ratio of obligation to net income.

50. The calculation of the child support obligation is as follows:

Effective March 19, 2006, Defendant/Father shall pay Plaintiff/Mother for support for the two minor children, the sum of $1032.89 per month ($674.55 per month for one) or until further Order of the Court.

In addition to monthly child support, Defendant/Father shall pay Plaintiff/Mother 9.30% of any net bonus income for the care of the two minor children (6.17% of any net bonus income for one minor child).

On October 6, 2006, defendant filed a motion requesting that the circuit court adopt the mediator's recommendations. Plaintiff accepted the recommendation regarding monthly child support and agreed that defendant's parenting time consisted of 157 overnight visits a year. However, plaintiff rejected the mediator's recommendation regarding the modification of the bonus percentage. On October 13, 2006, the circuit court entered an order providing as follows:

1. Defendant's motion for modification of child support is hereby GRANTED in part and, by agreement of the parties, the Court adopts the recommendations of the mediator as follows:

a. Defendant's monthly child support obligation shall be modified effective March 19, 2006;

b. The formula to be utilized in calculating monthly child support is the Shared Economic Responsibility Formula;

c. The monthly income to be utilized in the shared economic responsibility formula is $14,783.33 per month for Defendant and $6,702.08 for Plaintiff.

d. The number of overnights for the Defendant to be utilized in the shared economic responsibility formula is 157.

e. As of the effective date of modification, Defendant's monthly child support obligation is $1,032.89 per month.[5]

2. Plaintiff's cross-motion for modification of child support is hereby DENIED.

3. That portion of Defendant's motion for modification of child support relating specifically to modification, if any, of a percentage of Defendant's net bonus shall be scheduled for an evidentiary hearing before this Court.

On January 19, 2007, the circuit court conducted the evidentiary hearing regarding the bonus percentage. Both parties testified regarding their interpretations of the contract's bonus clause. Plaintiff testified that she and defendant had agreed that she would receive 25 percent of defendant's bonus until the older child's eighteenth birthday. The bonus percentage "would then drop to 15 percent" and would remain at that level until the younger child's eighteenth birthday. Plaintiff conceded that this amount was considered child support rather than a property settlement and that child support is modifiable under Michigan law. Plaintiff nevertheless asserted, "My position is that Rich and I agreed that it would not be modifiable until [the older child] turned 18, which we can do."

Defendant contended that when they negotiated the bonus provision, he and plaintiff applied the same percentage (25 percent) to his bonus as they had to his income when calculating his monthly child support payment. He asserted that he had agreed to pay more

[5] This constituted a $45 increase in defendant's payments.

than the SERF required so that plaintiff would agree to allow him more overnight visits with his children, declaring, "I paid extra money to purchase time with my children and to guarantee they could stay in the home." Defendant testified that he and plaintiff had intended the bonus percentage to remain at 25 percent for 10 years and that ¶ 8 of the contract "guaranteed" that after 10 years the bonus percentage would change. He explained: "I also understood at the time that all child support agreements had to read that they continued until a child was 18 or had graduated from high school. That was standard language."

Attorney Roger Boer represented plaintiff at the time of the divorce and drafted the contract. According to Boer, the parties modeled the bonus percentages on those used by divorcing Steelcase employees because Steelcase "had a wonderful bonus plan" and the 25 percent formula for two children was "state of the art at the time that most judgments contained that." Boer asserted that when he drafted the contract, he intended that the bonus percentages "would run" until the specific events identified in the contract, the children's eighteenth birthdays. Boer, too, conceded his awareness that child support is always modifiable under Michigan law.

The circuit court ruled from the bench as follows:

> I am asked by Ms. Holmes to find that this is a contractual negotiated provision and to not modify its terms.
>
> The Court declines to be persuaded by this argument.
>
> Certainly there are many times when additional support is a negotiated, contractual, additional enforceable term, such as agreements within judgments that a parent agrees to pay for college, or in some cases where bonus amounts are also referred to in the property section and there is

> specific language that although child support is reviewable, this specific term is not to be modified and was a part of the negotiated agreement.
>
> I don't find that those clarifying terms exist in the parties' judgment of divorce. I do not find that this is a negotiated portion of a property settlement.
>
> I do find that the bonus, as with the child support, is modifiable and that the terms contained in the judgment allow for the Court to review what modifications are appropriate.
>
> In reviewing the extensive income information, the Court concurs with the agreement of the parties, that the application of the SERF formula is appropriate in this case.
>
> * * *
>
> As SERF has been applied to the child support component, I also believe that the SERF application is appropriate to utilize when evaluating the bonus funds.
>
> I concur with the observations, findings and recommendations of the skilled mediator, David Sarnacki.
>
> The Court will utilize the same computations and order that as SERF is applied to the bonus, that 9.3 percent of Mr. Holmes' bonus be paid over annually to Ms. Holmes to assist in supplementing the child support she receives to care for the children.

Plaintiff filed a delayed application for leave to appeal, which this Court granted.

II. STANDARD OF REVIEW

We review for an abuse of discretion child support orders and the modification of such orders. *Peterson v Peterson*, 272 Mich App 511, 515; 727 NW2d 393 (2006). However, "[w]hether a trial court properly operated within the statutory framework relative to child support calculations and any deviation from the child

support formula are reviewed de novo as questions of law." *Id*. at 516. An appellate court also reviews de novo a trial court's finding "derived from an erroneous application of law to facts." *Beason v Beason*, 435 Mich 791, 804-805; 460 NW2d 207 (1990). To the extent that the circuit court's ruling involves statutory construction, this Court also applies review de novo. *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007).

The existence of a contract involves a question of law, which we review de novo. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Contract interpretation also presents a question of law, again subject to review de novo. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). A divorce judgment "entered upon the settlement of the parties . . . represents a contract, which, if unambiguous, is to be interpreted as a question of law." *In re Lobaina Estate*, 267 Mich App 415, 417-418; 705 NW2d 34 (2005).

III. CHANGE OF CIRCUMSTANCES

Plaintiff contends that the circuit court should not have altered defendant's child support obligation absent an evidentiary hearing demonstrating a change in circumstances. In her March 31, 2006, cross-motion for modification of child support, however, plaintiff alleged a change of circumstances, including defendant's failure to use all available parenting time and an increase in defendant's income. This admission, combined with plaintiff's stipulation to accept Sarnacki's recommendations regarding defendant's monthly child support obligation, precludes her from challenging the circuit court's finding that circumstances had changed. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial

court." *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442 (2006) (quotation marks omitted), aff'd 478 Mich 348 (2007). "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Therefore, the circuit court did not err by concluding that a change of circumstances warranted modification of defendant's monthly child support payment.

IV. GOVERNING LEGAL PRINCIPLES REGARDING CHILD SUPPORT

A circuit court's power to determine an award of child support is governed by MCL 552.605(2), which provides:

> Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

This statute specifically acknowledges that under certain circumstances, a court may properly deviate from the guidelines: "Subsection (2) does not prohibit the court from entering a child support order that is agreed

to by the parties and that deviates from the child support formula, if the requirements of subsection (2) are met." MCL 552.605(3).

The 2004 MCSFM states: "Based on the estimated costs of raising children and factors like parental income, family size, and ages of children, the formula provides for appropriate support amounts in orders involving the support of children." 2004 MCSF 1.02. The 2004 MCSFM sets forth a lengthy list of potential "Deviation Criteria," including the following:

> (i) One or both parents earn incomes of a magnitude not fully taken into consideration by the formula.
>
> (j) One or both parents have varying amounts of irregular bonus income. [2004 MCSF 1.04(D)(5).]

The child support formula used by a circuit court " 'shall be based upon the needs of the child and the actual resources of each parent.' " *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998), quoting MCL 552.519(3)(a)(*vi*). Our Supreme Court has repeatedly emphasized the obligation of circuit courts to use the MCSFM guidelines in fashioning child support orders. In *Burba v Burba* (*After Remand*), 461 Mich 637; 610 NW2d 873 (2000), the Supreme Court established a procedure that circuit courts must follow when deviating from the MCSFM formula. The Supreme Court directed that the court "must first state the level of child support it would have ordered had it followed the formula . . . ." *Id*. at 645. Because courts "presumptively must follow the formula," they are required "to meticulously set forth" the statutory deviation criteria and "provide an explanation of how the order deviate[s] from the formula." *Id*. at 645-646.[6]

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[6] The divorce judgment in this case was entered several years before the Supreme Court's *Burba* decision. However, the circuit court and the

This Court strongly disfavors deviations from the child support formula premised on private agreements that *limit* a parent's obligation to pay child support. For example, in *Johns v Johns*, 178 Mich App 101, 106; 443 NW2d 446 (1989), this Court observed: "Parents may not bargain away a child's welfare and rights, including the right to receive adequate child support payments. An agreement by the parties regarding support will not suspend the authority of the court to enter a support order." (Citation omitted.) In *Ballard v Ballard*, 40 Mich App 37, 39-40; 198 NW2d 451 (1972), this Court refused to enforce a provision in a divorce judgment requiring that the custodial parent never seek modification of a child support order awarding her $2.84 a week for each child. This Court employed sweeping language in rejecting the parties' agreement: "[I]rrepsective of the agreement, the trial judge retained inherent jurisdiction to modify the judgment as to support payments upon a proper showing at any time." *Id*. at 40.

In contrast, this Court has enforced voluntary agreements to pay *additional* child support incorporated into a divorce judgment. In *Ovaitt v Ovaitt*, 43 Mich App 628, 629; 204 NW2d 753 (1972), this Court considered the power of the circuit court to enforce

> provisions in a judgment of divorce which require the husband to provide support (including college expenses) for his children after said children reach age 21, where the challenged provision was incorporated verbatim into the judgment from a written stipulation and property settlement agreement voluntarily executed by the parties prior to their divorce[.]

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parties freely deviated from the MCSFM guidelines throughout the first 10 years after the divorce and failed to strictly comply with the procedural rules discussed in *Burba*. Presumably, because the guidelines deviations benefited the children, the circuit court and the parties never considered that they should explain on the record the reasons for rejecting the MCSFM formula.

This Court held that a circuit court could validly exercise its discretion to enforce such provision, explaining that

> where the parties entered into an agreement that was incorporated by the court in its judgment, and the parties concede they knew at the time that the terms were not subject to performance fully within the minority of the children, it would be an invitation to chaos to hold that such provision was not enforceable. It would permit parties to divorce actions to play fast and loose with the court and with the other parties to the action by entering into agreements which they had no intention of performing. [*Id*. at 638.]

In *Aussie v Aussie*, 182 Mich App 454, 460; 452 NW2d 859 (1990), the defendant father entered into a postdivorce agreement requiring him to pay $6,000 a year toward one child's college expenses, "in return for which plaintiff waived her right to petition the circuit court 'for an increase in child support, above the current level of $75 per child, per week.' " The defendant breached the agreement, and the plaintiff filed a petition seeking an increase in child support, as well as reimbursement of the child's college expenses. The circuit court entered an order increasing the defendant's child support, but refused to enforce the postdivorce college-payment agreement. *Id*. This Court affirmed the circuit court's order for increased child support, observing that a circuit court "has the statutory power to modify orders for child support upon a showing by the petitioning party of a change in circumstances sufficient to justify a modification." *Id*. at 463. But citing *Ovaitt*, this Court reversed the circuit court's decision not to enforce the college-payment agreement, explaining that the "defendant did agree to pay the college expenses in consideration of plaintiff's agreement not to seek additional support at the time. Plain-

tiff kept her part of the bargain. As the *Ovaitt* panel concluded, failure to enforce such contracts would be 'an invitation to chaos . . . .' " *Id*. at 464.[7]

V. APPLICATION OF CHILD SUPPORT PRINCIPLES

The facts of the instant case readily distinguish it from *Johns* and *Ballard* and place it squarely alongside *Ovaitt* and *Aussie*. We hold that because the child support guidelines set forth a parent's minimum support obligation, a voluntarily assumed obligation to pay an amount in excess of the minimum is not inherently objectionable. Therefore, a contract enhancing a parent's child support obligation should be enforced absent a compelling reason to forbear enforcement. The circuit court refused to enforce the bonus provision of the agreement that the parties, both attorneys, entered into voluntarily, despite the absence of any evidence that its enforcement would create a hardship for defendant or otherwise qualify as unjust or inappropriate. The history of the parties' child support dispute illustrates that enforcement of the bonus provision served the purposes of the statutes governing child support while preserving the court's ability to modify defendant's obligations if his financial circumstances, or that of his children, were to change.

Defendant consistently contended throughout these lengthy proceedings that when he entered into the

[7] In *Aussie*, this Court acknowledged that in *Smith v Smith*, 433 Mich 606; 447 NW2d 715 (1989), the Michigan Supreme Court held that a circuit court lacked jurisdiction to order child support beyond the age of majority. *Aussie* distinguished *Smith* as follows: "[W]e do not read *Smith* to preclude plaintiff from enforcing a clear contract of the parties which may be of record or in the judgment in the case." *Aussie*, 182 Mich App at 464. The Michigan Legislature subsequently enacted MCL 552.16a "in response to" *Smith*'s conclusion that "Michigan law did not provide for postmajority support." *Rowley v Garvin*, 221 Mich App 699, 706; 562 NW2d 262 (1997).

contract, the SERF guidelines applied. According to defendant, because he spent more than the requisite number of overnight visits with the children, plaintiff was not entitled to utilize the "straight guidelines" formula. Defendant alleged that the parties' compromise regarding application of the SERF led to the development of the contract, specifically that he gave up on application of the SERF solely to avoid a protracted custody battle that could have resulted in a reduction of his parenting time and a consequent application of the "straight guidelines" formula.

That compromise involved payment of a significant, certain, and presumptively nonmodifiable percentage of his yearly bonus. Defendant agreed to pay a larger percentage of his bonus than he would have had to pay if the SERF were applied. Thus, the agreement negotiated by the parties required defendant to pay an amount exceeding the guidelines, which served to benefit the Holmes children and caused no demonstrable hardship for defendant during the 10 years that he paid it. Continued enforcement of the 25 percent bonus provision benefits the Holmes children without violating the court's inherent ability to modify the child support award if circumstances substantially change or the child support amount qualifies as "unjust or inappropriate" under MCL 552.605(2)(d). Accordingly, we conclude that the circuit court erred by concluding that it lacked the power to enforce the contractual bonus provision.

VI. GOVERNING CONTRACT PRINCIPLES

A contract must be interpreted according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). Our interpretation of contractual language is further guided by the following precepts:

> Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning. [*Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997) (citations omitted).]

In *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005), the Supreme Court emphasized that courts must construe unambiguous contract provisions as written. "We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of 'reasonableness' as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Id.* In *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007), the Supreme Court again stressed that contracts must be enforced as written: "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts, if the contract is not 'contrary to public policy.' " Parties may elect to include a written-modification clause in a contract, but with or without such a clause, "the principle of freedom to contract does not permit a party *unilaterally* to alter the original contract." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003) (emphasis in original).

"Judgments entered pursuant to the agreement of parties are of the nature of a contract." *Gramer v Gramer*, 207 Mich App 123, 125; 523 NW2d 861 (1994). A long line of case-law reflects that divorcing parties may create enforceable contracts. In *Gramer*, this Court enforced a property settlement agreement, concluding that there was "no claim of any factor such as fraud or duress" and that its language qualified as "unambiguous and unequivocal." *Id*. More recently, in *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006), we enforced the parties' separation agreement, created in contemplation of their divorce, observing that "[g]enerally, contracts between consenting adults are enforced according to the terms to which the parties themselves agreed."

In *Lobaina Estate*, this Court applied the principles of *Gramer* and *Lentz* to a divorce judgment provision entitled "Support of Minor Children—Life Insurance." The provision required both parties to "irrevocably designate the minor children as beneficiaries of any life insurance policies they may have by virtue of their employment" until the end of the parties' support obligations. *Lobaina Estate*, 267 Mich App at 417. This Court enforced the provision, reasoning that "[b]ecause the judgment of divorce was entered upon the settlement of the parties, it represents a contract, which, if unambiguous, is to be interpreted as a question of law." *Id*. at 417-418. In *Krueger v Krueger*, 88 Mich App 722, 724-725; 278 NW2d 514 (1979), this Court acknowledged that although the circuit court lacked the power "to compel a party to convey property or a property interest to a third person, even a child of the parties," it could confirm a settlement regarding property interests. In *Krueger,* we explained:

> The wife took no alimony and the child support was in an amount less than that recommended by the Friend of

> the Court. She gave up something she was entitled to in exchange for a benefit to her child. Under these circumstances many courts have held that the agreement embodied in the judgment will be enforced even if the court would have had no power to order the same disposition in a contested case. [*Id*. at 725.]

The Court also enforced a contested insurance agreement not linked to a child support provision, characterizing it as an "obligation, voluntarily undertaken," and subject to court enforcement. *Id*. at 726.

The contractual language here qualifies as clear and unambiguous:

> Further, Husband shall pay twenty-five percent (25%) of any net bonus he receives in any given year as additional child support. When the oldest child attains the age of 18 or completes high school, whichever event occurs last, this payment shall be reduced to fifteen percent (15%) of his net bonus, and shall terminate upon the youngest child's attaining the age of 18 or graduating from high school, whichever lasts occurs.

It contains definite terms regarding is duration and lacks any reference to future adjustments or modifications. By its terms, the agreement plainly contemplated that the 25 percent bonus payments would continue until the older child's eighteenth birthday. We reject defendant's argument that the bonus provision was modifiable because paragraph 8 permitted the circuit court to review "support" after one year. This Court reads contracts as a whole, giving harmonious effect to each word and phrase. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc,* 267 Mich App 708, 719; 706 NW2d 426 (2005). Specific contractual provisions normally override general ones. *Id.*

We further reject defendant's argument that the parties intended that the original base child support percentage (25.4) would also apply to the bonus. The

25.4 base support percentage applied only during the first year of the agreement. During the next 10 years, defendant's income and bonuses fluctuated, as did his support obligation. The parallel bonus ratio did not necessarily continue during the time that the parties voluntarily abided by the support provision. Moreover, regardless of the basis for the initial calculation, the plain language of the agreement contemplates that the agreed percentages would apply until the children's eighteenth birthdays.

The circuit court recognized its authority to enforce a parent's contractual agreement to pay a child's college expenses or a similarly worded bonus provision contained in the property settlement section of a divorce judgment. The circuit court expressly admitted, "Certainly there are many times when additional support is a negotiated, contractual, additional enforceable term . . . ." Nevertheless, the circuit court refused to enforce this "negotiated, contractual, additional- . . . term" because (1) the contract lacked "specific language that although child support is reviewable, this specific term is not to be modified," (2) child support is always modifiable, and (3) "[a]s SERF has been applied to the child support component, I also believe that the SERF application is appropriate to utilize when evaluating the bonus funds." The circuit court further referred to ¶ 42 of Sarnacki's conclusions regarding the modifiability of the bonus provision:

> Despite Elizabeth's contention that the bonus percentage was separate and distinct, it was included in the child support provisions, which are modifiable by law. That percentage served the parties well for 10 years. Now, with the entire obligation under review, there is no reason to ignore the new ratio of obligation to net income. The bonus percentage should reflect the child support obligation as modified.

The absence of specific contractual language prohibiting modification of the bonus provision does not render the bonus provision unenforceable. Contracts are enforced as written, and no exception to this basic rule exists for contracts lacking a modification clause. Furthermore, the parties included a "review" provision in ¶ 8, contemplating that the monthly child support payments would be "fixed for one year after the entry of the Judgment of Divorce, before it can be reviewed, and that support will be reviewed only in the event that either Husband or Wife is receiving greater compensation than at the time of the entry of the Judgment of Divorce." The absence of a similar provision regarding the bonus percentage supports the conclusion that the parties did not intend that percentage to be modifiable. Furthermore, merely because a circuit court possesses the power to modify a child support award, it may not simply ignore an unambiguous contractual provision regarding child support.

Finally, the circuit court opined that "additional support" might constitute a "negotiated, contractual, additional enforceable term" when it is included in the "property section" of a divorce judgment. Apparently, the circuit court would have enforced the bonus provision as written if it had been labeled as part of the parties' property settlement rather than placed in a child support paragraph. We conclude that this is a distinction lacking a meaningful difference. Regardless of the bonus provision's location in the judgment, the provision is contractual, freely negotiated, and unambiguous. Therefore, it must be enforced as written.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

ASSEMBLERS, INC v AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY

Docket No. 281728. Submitted December 2, 2008, at Detroit. Decided December 9, 2008, at 9:05 a.m. Leave to appeal sought.

Assemblers, Inc., brought an action in the Wayne Circuit Court against American Manufacturers Mutual Insurance Company, United States Fidelity & Guaranty Company (USF&G), and Metro Steel Fabricators, Inc., seeking payment for work performed on a project involving the demolition and reconstruction of a school owned by the Detroit Public Schools. The Detroit Public Schools contracted with American International, Inc., to be the general contractor for the project. American International obtained a payment bond from USF&G and subcontracted part of the project to Metro Steel, which obtained its own payment bond from American Manufacturers. Metro Steel then subcontracted part of the work to Assemblers. On May 8, 2003, Assemblers stopped working because it was not receiving its expected payments. On March 25, 2004, the Detroit Public Schools terminated its contract with American International because of its failure to properly make the payments. On May 6, 2004, Metro Steel acknowledged the amount that Assemblers was still owed. The Detroit Public Schools persuaded Assemblers to return to the work site and complete its work on August 19, 2004. Assemblers notified both sureties on August 27, 2004, that it was making a claim on each payment bond. Assemblers commenced its action when both sureties denied the claim. All parties moved for summary disposition. The court, Kathleen Macdonald, J., granted summary disposition in favor of the sureties on the bases that the claim against USF&G was not filed within the 90-day period required by the public works bond statute, MCL 129.201 *et seq*., and the claim against American Manufacturers was not filed within the one-year period for giving notice stated in its payment bond. Assemblers appealed.

The Court of Appeals *held*:

1. MCL 129.201 imposes the requirement of providing a bond under the statute only on the principal contractor. Metro Steel was not a principal contractor and, therefore, was not required by

statute to provide a bond. The payment bond issued by American Manufacturers was a contractual, rather than statutory, bond and, therefore, the limitations period provided therein applied. The grant of summary disposition in favor of American Manufacturers must be affirmed.

2. The bond issued by USF&G to American International, the principal contractor, was a statutory bond. Therefore, Assemblers was required to give written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished the last of the material for which the claim is made. MCL 129.207. The evidence is not sufficient to determine whether the work Assemblers performed on August 19, 2004, was in performance of the contract. The grant of summary disposition in favor of USF&G must be reversed and the case must be remanded for further proceedings to determine whether the work performed on August 19, 2004, was work on the contract or pursuant to a separate agreement between Assemblers and the Detroit Public Schools.

3. There is no requirement in the statute or the bonds that Assemblers exhaust any recovery from American Manufacturers, the surety closest in line to the claimant, before it may recover under the bond issued by USF&G.

Affirmed in part, reversed in part, and remanded.

BONDS — PUBLIC WORKS — PRINCIPAL CONTRACTORS.

The public works bond statute imposes the requirement of providing a bond under the statute only on the principal contractor; the principal contractor is the contractor who has the primary responsibility for performing the terms of the contract (MCL 129.201).

Kallas & Henk PC (by *John F. Fleming*) for Assemblers, Inc.

Steven A. Wright, P.C. (by *Sandra L. Wright* and *Steven A. Wright*), for American Manufacturers Mutual Insurance Company.

Alber Crafton, PLLC (by *Phillip G. Alber* and *Omar J. Harb*), for United States Fidelity & Guaranty Company.

Before: BORRELLO, P.J., and DAVIS and GLEICHER, JJ.

DAVIS, J. Plaintiff appeals as of right orders of summary disposition entered in favor of defendants American Manufacturers Mutual Insurance Company (American Manufacturers) and United States Fidelity & Guaranty Company (USF&G). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

This case arises out of the Howe Elementary School demolition and reconstruction project begun by the Detroit Public Schools in 2001. The Detroit Public Schools contracted with American International, Inc., to be the general contractor for the project. American International obtained a payment bond from USF&G, and it subcontracted part of the construction project to defendant Metro Steel Fabricators, Inc. (Metro Steel). Metro Steel obtained its own payment bond from American Manufacturers. Metro Steel then subcontracted part of the construction work to plaintiff.

On May 8, 2003, plaintiff "stopped working on the Howe Elementary School project" without completing it. Plaintiff contends that its work on the project was nearly complete at that time, but that it was not receiving its expected payments and it perceived that it would continue not receiving its payments. Plaintiff therefore ceased work "to avoid further losses." It is undisputed that plaintiff was not, in fact, paid all that it was owed on the Howe Elementary School project. On March 25, 2004, the Detroit Public Schools formally terminated the construction contract with American International for failure "to properly make payments to Subcontractors or for labor, materials and equipment" pursuant to that contract.[1] On May 6, 2004, Metro Steel explicitly acknowledged in a letter to plaintiff that

[1] American International has apparently filed for bankruptcy and ceased to exist.

$124,666 remained owing on the Howe Elementary School project. Plaintiff seeks the same amount in the instant action. Nevertheless, the Detroit Public Schools thereafter persuaded plaintiff to complete its work on the project, giving plaintiff "assurances of payment." On August 19, 2004, plaintiff returned to the work site and completed its work on the Howe Elementary School project.

On August 27, 2004, plaintiff sent notices to both sureties that it was making a claim on each of the payment bonds. Plaintiff then commenced the instant action against them. All parties filed motions for summary disposition. USF&G argued that the last day plaintiff worked as a subcontractor to a subcontractor on the original contract was May 8, 2003, and that it failed to provide notice of its claim within 90 days thereof, as required by the contractor's bond for public buildings or works act, MCL 129.201 *et seq*.[2] USF&G also argued that it could not be held liable on the bond because it was a secondary surety to American Manufacturers's bond and because plaintiff was responsible for delays in the project. American Manufacturers argued that its bond contained a contractual limitations period that required claimants to file suit within one year of giving notice under the bond or of the last day on which work was performed and that plaintiff exceeded this date by more than three months under any possible interpretation of the facts. Plaintiff argued that the work it performed on August 19, 2004, was merely a completion of its work on its subcontract with a subcontractor and that American Manufacturers's bond was a statutory bond and it was required to afford the

[2] This is also known as "the public works bond statute." See, e.g., *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655, 657; 545 NW2d 351 (1996).

longer limitations period available under the public works bond statute. The trial court granted summary disposition in favor of the sureties; the parties later agreed to a consent judgment and final order resolving the remaining claims.[3]

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Maiden*, *supra* at 120. A motion brought under MCR 2.116(C)(8) should be granted only where the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Maiden*, *supra* at 119. This Court also reviews de novo as a question of law the proper interpretation of both contracts and statutes. *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

MCL 129.201 *et seq*. was created by the Legislature in order to protect "principal contractors" from the void left by the "long-standing mechanics' lien law" that prohibited mechanics' liens on public buildings. *Adamo Equip Rental Co v Mack Dev Co, Inc*, 122 Mich App 233, 236; 333 NW2d 40 (1982). Although intended "to safeguard and protect contractors and materialmen in the public sector," it significantly distinguishes between "rights and duties of the primary contractor and the

[3] Metro Steel is not a party to this appeal.

rights and duties of the secondary contractors . . . ." *Id*. at 236-237. This Court has explained that "the principal contractor" means "the contractor who has the primary responsibility for performing the terms of the contract" and might or might not be the first contractor. *Id*. at 237. The plain language of MCL 129.201 imposes the requirement of providing a bond under the statute *only* on the principal contractor.

It is undisputed that Metro Steel was not the principal contractor, so Metro Steel was not required by statute to provide a bond pursuant to MCL 129.201 *et seq*. Plaintiff contends, however, that the bond issued by American Manufacturers is a statutory bond because it incorporates by reference Metro Steel's subcontract with American International, which in turn allegedly required Metro Steel to obtain a statutory bond because the subcontract between Metro Steel and American International incorporated by reference the prime contract between American International and the Detroit Public Schools that required American International to provide a statutory bond.[4] The prime contract appears to require the general contractor to obtain a payment bond using a form explicitly specifying that the bond is statutory and in conformance with the public works bond act. However, Metro Steel is not the general contractor, the reference to "bidders" appears to be in the context of dealings directly with the project owner, and the American Manufacturers bond did not include that particular language.

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[4] Plaintiff also argues that the plain language of American Manufacturers's bond shows that it is a statutory bond, but the paragraph on which plaintiff relies is inapplicable: by its own terms, that paragraph only applies where the "[b]ond has been furnished to comply with a statutory or other legal requirement." Because Metro Steel was not the principal contractor, it did not obtain the bond from American Manufacturers to comply with "a statutory or other legal requirement."

Indeed, there is *no* language in the American Manufacturers bond or in the subcontract between American International and Metro Steel making *any* reference to a statutory bond. Rather, the subcontract states that any other documents referenced are "as amended or supplemented by other provisions of the Subcontract Documents," and it explicitly states that the subcontract takes precedence over the prime contract in the event any provisions are inconsistent. Given that MCL 129.201 *et seq*. are only intended to govern the principal contractor, and given that none of the documents executed by any party to the instant appeal imposed any requirement of a statutory bond, we conclude that no statutory bond was required of American Manufacturers.[5] We agree with the trial court that the payment bond issued by American Manufacturers was contractual, rather than statutory, so the limitations period specified therein applied.

Conversely, it is undisputed that the USF&G payment bond was a statutory bond because it was issued to American International, the principal contractor on the Howe Elementary School project. As a consequence, for plaintiff to make a claim under the bond, it must have "given written notice to the principal contractor and the governmental unit involved within 90 days from the date on which the claimant performed the last of the labor or furnished or supplied the last of the material for which the claim is made . . . ." MCL

[5] Plaintiff also relies on caselaw involving similarly worded payment bonds. But those cases involved principal contractors who had contracted directly with a public entity, and there was therefore no dispute that statutory bonds were required, *Gloucester City Bd of Ed v American Arbitration Ass'n*, 333 NJ Super 511; 755 A2d 1256 (2000), or were cases where a statutory bond was otherwise indisputably required. *Kirkpatrick v Phillips*, 162 Mich 251; 127 NW 340 (1910). These cases are therefore irrelevant to the issue at hand.

129.207. Additionally, a "claimant" is defined as "a person having furnished labor, material, or both, used or reasonably required for use in the performance of the contract." MCL 129.206. The parties agree that the applicable limitations period is 90 days after the last day of work on the contract. The bond act itself is to be liberally construed, but the notice requirement must be strictly construed and enforced. *Grand Blanc Cement Products, Inc v Ins Co of North America*, 225 Mich App 138, 144; 571 NW2d 221 (1997). Plaintiff provided "notice" on August 27, 2004. Therefore, the most significant issue is whether the work plaintiff performed on August 19, 2004, was "in the performance of the contract."

We find that issue impossible to resolve on the basis of the existing factual development in this matter. It is not seriously contended that the work plaintiff performed on that date was so *de minimis* that it cannot be counted, nor is it seriously contended that the work on that date was not work that had originally been called for under the contract. USF&G argues that the total amount plaintiff claims it is owed *on the contract* had already been agreed on by all relevant parties *before* it performed the additional day of work. This could be construed as an acknowledgement that the original contract was terminated at that point, but it could also simply be an acknowledgement of why plaintiff was no longer performing work on the contract; in any event, the letter only purports to confirm that plaintiff was owed further payment. Although plaintiff apparently performed the additional day of work on the basis of "assurances" by the Detroit Public Schools, there is in fact no evidence in the record shedding any light on what actually happened in that transaction. USF&G points out that plaintiff documented that additional day of work on a form entitled "additional work authoriza-

tion." However, USF&G's argument that the mere title of a form proves anything about the underlying transaction elevates form over substance, and in any event, the form also specifies that Metro Steel (the subcontractor) is the entity to be invoiced.

We find that the evidence—when properly viewed in the light most favorable to the nonmoving party—simply cannot foreclose or prove *either* possibility. Without further factual development, neither party could be entitled to summary disposition on this basis.

We do, however, conclude that *if* the work plaintiff performed on August 19, 2004, was "on the contract," the fact that American International had been terminated as the general contractor is irrelevant. USF&G's bond provides that it will not be liable for obligations of the contractor (American International) that are unrelated to the construction project. However, the unpaid work for which plaintiff is attempting to bring a claim all predates American International's termination, and in any event, American International's termination as the general contractor did not terminate plaintiff's status as a subcontractor to a subcontractor. The issue remains whether the work was "on the contract" or pursuant to a separate agreement between plaintiff and the Detroit Public Schools.

USF&G also urges us to adopt § 53 of the Restatement of Suretyship and Guaranty, 3d. In particular, USF&G argues that suretyship law obligates a claimant to exhaust recovery from the surety "closest" to the claimant, which in this case would be American Manufacturers. USF&G further argues that if plaintiff cannot do so because it exceeded the applicable limitations period in American Manufacturers's bond, plaintiff can only blame itself for not having a remedy. However, it is undisputed that there is no Michigan law on this point.

We conclude that applying USF&G's proposed rule here would be contrary to the stated purpose of MCL 129.201 *et seq*.

The public works bond act is to be liberally construed to "protect contractors and materialmen in the public sector to ensure that they do not suffer injury when other contractors default on their obligations." *W T Andrew Co, Inc v Mid-State Surety Corp*, 450 Mich 655, 659; 545 NW2d 351 (1996). It was enacted by the Legislature because materialmen and contractors cannot place liens on public buildings; by its own express terms, it is intended to protect parties who "furnished labor, material, or both, used or reasonably required for use in the performance of the contract." MCL 129.206; see MCL 129.203; *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 181-182; 504 NW2d 635 (1993). The payment bond issued by USF&G likewise defines a "claimant" to include any "individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Contract."

Neither the bond nor the statute contains an exemption or exception for any other payment bonds, nor do any of the conditional prerequisites to recovery include exhaustion of recovery from any other sureties. Indeed, they show the opposite. The Legislature passed the public works bond act to require bonds like the one issued by USF&G for the purpose of protecting parties like plaintiff. The plain language of the statute and the bond itself show that USF&G is liable on its bond irrespective of the American Manufacturers bond, at least presuming plaintiff is found on remand to have fulfilled the other requirements for being a claimant.

The sureties finally assert that plaintiff cannot recover on either bond because plaintiff was responsible for delays in the construction project. However, the trial court did not address this matter, and facts necessary to make that determination do not appear to have been entered into the record. We decline to consider this issue in light of the existing lack of factual development.

We affirm the trial court's grant of summary disposition in favor of American Manufacturers. We reverse the trial court's grant of summary disposition in favor of USF&G, and we remand to the trial court for further proceedings. We do not retain jurisdiction.

PEOPLE v RUSSELL (ON REMAND)

Docket No. 264597. Submitted October 23, 2008, at Lansing. Decided December 11, 2008, at 9:00 a.m.

An Oakland Circuit Court jury convicted Thomas W. Russell of child sexually abusive activity, use of the Internet to communicate with another for the purpose of violating the statute prohibiting child sexually abusive activity, and three counts of using the Internet to communicate with another for the purpose of attempting to distribute obscene material to a minor. The defendant's offenses involved Internet communications with an adult male special agent for the Attorney General who the defendant thought was a 14-year-old girl. At sentencing, the parties disagreed about scoring offense variable 10 (exploitation of a vulnerable victim), MCL 777.40. The court, Nanci J. Grant, J., assessed 15 points for that variable, the score applicable when predatory conduct was involved. The court reasoned that an actual victim was not a prerequisite for assessing 15 points. The Court of Appeals affirmed the defendant's convictions and sentences in an unpublished opinion per curiam issued February 8, 2007 (Docket No. 264597). The Supreme Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration of the scoring issue in light of *People v Cannon*, 481 Mich 152 (2008). 482 Mich 995 (2008).

On remand, the Court of Appeals *held*:

The trial court erred by assessing points for offense variable 10. Under *Cannon*, points should be assessed for that variable only when it is readily apparent that a victim was vulnerable, that is, was susceptible to injury, physical restraint, persuasion, or temptation. Offense variable 10 does not apply if no vulnerable victim was in fact placed in jeopardy or exploited by the offender's actions. Regardless of the defendant's subjective intent, his conduct did not place a vulnerable victim in jeopardy because there was, in fact, no vulnerable victim to be jeopardized. The adult male agent with whom the defendant communicated did not qualify as a vulnerable victim under *Cannon*, and no points can be assessed for offense variable 10.

Two of the defendant's sentences vacated; case remanded for resentencing.

SENTENCES — SENTENCING GUIDELINES — OFFENSE VARIABLES — VICTIMS OF CRIMES — VULNERABLE VICTIMS — PREDATORY CONDUCT.

No points may be assessed for offense variable 10 of the sentencing guidelines (exploitation of a vulnerable victim) if no vulnerable victim was in fact placed in jeopardy or exploited by the offender's actions, regardless of the offender's subjective intent (MCL 777.40).

Michael A. Cox, Attorney General, and *B. Eric Restuccia*, Solicitor General, for the people.

Gary L. Kohut for the defendant.

ON REMAND

Before: DONOFRIO, P.J., and BANDSTRA and ZAHRA, JJ.

PER CURIAM. In an order issued on September 24, 2008, our Supreme Court vacated the portion of this Court's earlier opinion per curiam that upheld the trial court's assessment of 15 points for offense variable 10 (OV 10), MCL 777.40 (exploitation of a vulnerable victim), and remanded the case to this Court for reconsideration in light of *People v Cannon*, 481 Mich 152; 749 NW2d 257 (2008). On the basis of *Cannon*, we reverse.

I. UNDERLYING FACTS AND PROCEEDINGS

Defendant was convicted of one count of child sexually abusive activity, MCL 750.145c(2), one count of use of the Internet to communicate with another for the purpose of violating the statute prohibiting child sexually abusive activity, MCL 750.145d(1)(a), and three counts of use of the Internet to communicate with another for the purpose of attempting to distribute obscene matter to a minor, MCL 750.145d(1)(a), after a

jury trial. Defendant communicated over the Internet with a person he thought was a 14-year-old girl named "Kelly," but who in fact was an adult male special agent for the Attorney General. Defendant engaged in explicit sexual conversations with "Kelly," sent "her" nude photographs of himself, and eventually arranged to meet "her" for the purpose of engaging in sexual activity. Defendant was arrested when he arrived at the predetermined meeting location. A search of defendant's truck revealed an overnight bag, two condoms, personal lubricant, and an atlas.

At sentencing, the parties disagreed about the scoring of OV 10, MCL 777.40. That statute provides, in pertinent part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved . . . . . 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status . . . . . 10 points
>
> * * *
>
> (d) The offender did not exploit a victim's vulnerability . . . . . 0 points
>
> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

Defendant objected to the probation department's scoring of OV 10 at 10 points, arguing that because no actual underage person was involved in this case, there was no victim to be exploited. The prosecutor argued that OV 10 should be scored at 15 points because defendant engaged in predatory conduct designed to persuade a person who he thought was an underage girl to participate in sexual activity with him. The trial court concluded that OV 10 should be scored at 15 points, reasoning that an actual victim was not a prerequisite to such scoring. The change in the scoring of OV 10 to 15 points (along with another scoring change that is not at issue) resulted in a sentencing guidelines recommended minimum term range of 45 to 75 months for the most serious offense, child sexually abusive activity.

The trial court sentenced defendant to concurrent terms of 45 to 240 months for child sexually abusive activity and use of the Internet to communicate with another for the purpose of violating the statute prohibiting child sexually abusive activity and 12 to 48 months for each count of use of the Internet to communicate with another for the purpose of attempting to distribute obscene matter to a minor.

Defendant appealed in this Court, and in *People v Russell*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2007 (Docket No. 264597), this Court affirmed defendant's convictions and sentences. Considering defendant's application for leave to appeal, our Supreme Court entered an order providing as follows:

> By order of July 18, 2007, the application for leave to appeal the February 8, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Cannon*, (Docket No. 131994). On order of the

> Court, the case having been decided on June 4, 2008, 481 Mich 152 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment addressing defendant's argument regarding whether points for predatory conduct may be assessed for offense variable 10, MCL 777.40(3)(a) (exploitation of a vulnerable victim), where the victim is a police decoy, and we remand this case to the Court of Appeals for reconsideration of that issue in light of *Cannon*, *supra*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction. [*People v Russell*, 482 Mich 995 (2008).]

II. ANALYSIS

In *Cannon*, the defendant and his codefendants committed an armed robbery of a Burger King restaurant. The defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529. At sentencing, the prosecutor argued that OV 10 should be scored at 15 points because the defendant engaged in predatory conduct, including waiting in a nearby vehicle until no customers were in the restaurant. The prosecutor asserted that the defendant and his codefendants specifically targeted the restaurant and intended that their actions would victimize the employees of the restaurant. The trial court assessed 15 points for OV 10, finding that the defendant engaged in predatory conduct because he could have signaled his codefendants to stop the robbery. *Cannon, supra* at 154-155. This Court affirmed the scoring of OV 10, concluding that the defendant's actions constituted predatory conduct. This Court noted that the evidence showed that the defendant and his codefendants had planned the robbery in advance, parked their vehicle in a place where it would

not be seen, and waited until all customers had left before entering the restaurant. *Id*. at 155-156.

The Supreme Court reasoned that the intent of OV 10 was "the assessment of points for the exploitation of vulnerable victims." *Id*. at 157. The Court noted that the statute specifically states that zero points are to be assigned when the " 'offender did not exploit a victim's vulnerability.' " *Id*. at 158, quoting MCL 777.40(1)(d). The Court concluded that "points should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *Cannon*, *supra* at 158. The Court thus emphasized the protection of vulnerable victims and sanctioning their exploitation. In other words, regardless of an offender's subjective intent, if no vulnerable victim was in fact placed in jeopardy or exploited by an offender's actions, OV 10 does not apply.[1]

Under the analysis of *Cannon*, regardless of defendant's intent, his conduct did not place any vulnerable victim in jeopardy because there was, in fact, no vulnerable victim to be jeopardized. The person with whom defendant communicated was not a vulnerable 14-year-old girl named "Kelly"; he was, instead, an adult special agent. Such a person would not qualify as a vulnerable victim under the factors set out in *Cannon*. *Id*. at 158-159. We conclude that, under these circumstances, no points can be assessed for OV 10.[2]

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[1] We recognize that this is not the rule applicable to the elements of the criminal offenses at issue here. See *People v Thousand*, 465 Mich 149, 165-166; 631 NW2d 694 (2001); *People v Cervi*, 270 Mich App 603, 624; 717 NW2d 356 (2006).

[2] Further, we note that, even if OV 10 could be applied against defendant, points could not be assessed against him for "predatory conduct," which is defined to require "preoffense conduct." MCL 777.40(3)(a). *Cannon* explained that the first question in determining

The trial court erred by assessing sentencing guidelines points for OV 10. We vacate defendant's sentences for child sexually abusive activity and use of the Internet to communicate with another to violate the statute prohibiting child sexually abusive activity, and we remand this case to the trial court for resentencing on those offenses. We do not retain jurisdiction.

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whether points can be assessed for predatory conduct is whether the offender engaged in conduct before the commission of the offense. *Cannon*, *supra* at 160, 162. Defendant's interactions on the Internet with the person he believed to be a 14-year-old girl named "Kelly" constituted the offenses themselves; there was no preoffense conduct, before his Internet communications, that could constitute predatory conduct.

HOOVER v MICHIGAN MUTUAL INSURANCE COMPANY

Docket No. 278237. Submitted October 7, 2008, at Detroit. Decided December 11, 2008, at 9:05 a.m. Leave to appeal sought.

Michael Hoover was injured by a drunk driver, rendering him developmentally disabled and quadriplegic. His parents, Rodney and Maxine Hoover, as conservators of his estate, brought an action in the Genesee Circuit Court in 1986 against Michigan Mutual Insurance Company, now known as Amerisure Mutual Insurance Company, to recover personal protection insurance benefits. The parties litigated the amount of benefits over the years and settled the amounts payable for many items necessary for Michael's care. The plaintiffs subsequently moved for an increase in benefits to cover home-care and living expenses, while the defendant moved for a reduction. The court, Robert M. Ransom, J., attributed 28 percent of the plaintiffs' home to Michael's needs and ordered the defendant to pay benefits covering that percentage of various expenses, such as property taxes and utility bills. The court ordered the defendant to pay benefits for 100 percent of other expenses, such as a backup generator and a dumpster. The court also ordered the defendant to pay the plaintiffs $15 an hour for the time spent cleaning Michael's portion of the house and some of the time spent removing snow from the driveway. Finally, the court ruled that the plaintiffs were entitled to penalty interest under MCL 500.3142 and reasonable attorney fees under MCL 500.3148. The defendant sought delayed leave to appeal. The Court of Appeals denied the application, but the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 478 Mich 865 (2007).

The Court of Appeals *held*:

The trial court did not properly apply *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521 (2005), resulting in erroneous conclusions on several, but not all, of the expenses and services at issue.

1. *Griffith* held that a no-fault insurer must pay benefits only to the extent that the benefits claimed are causally connected to the accidental bodily injury arising out of the automobile accident. *Griffith* requires a court to determine whether the expenses would

not have been incurred but for the accident and the resulting injury, that is, whether the expenses would have been incurred in the course of an ordinary life unmarred by an accident. If they would have been incurred anyway, a causal connection between the expenses and the accidental bodily injury would be lacking, and it could not be said that the accidental bodily injury necessitated the provision of products, services, and accommodations.

2. Under *Griffith*, parents providing accommodations and services for an injured adult child are not afforded no-fault benefits to the full extent of the accommodations and services provided. For example, had Michael not been injured, his activities would still have generated expenses for utility usage. Given the *Griffith* requirement of a causal connection, a court must allocate not the portion of a utility bill attributable to the injured person's usage, but that portion attributable to the injured person's usage that is occurring only because of the injuries, such as the power to operate Michael's ventilator. *Griffith* requires this even though the calculations and the proper allocation might prove difficult.

3. The trial court did not err by awarding benefits covering 100 percent of the costs of the backup generator, television monitoring system, medical alert pendant, elevator inspections, and dumpster. Those expenses are causally connected to, and necessitated by, Michael's injuries. Michael's injuries require use of an elevator, and inspecting it is a normal safety precaution. Even though the plaintiffs also use the dumpster for their garbage and Michael would generate some waste even if injury-free, Michael generates most of the garbage that goes into it, and a dumpster would not be necessary absent Michael's injuries. Like the special diet food discussed in *Griffith*, the dumpster is fully covered as a no-fault benefit.

4. The size of the house, its design, and various amenities in it are causally connected to, and necessitated by, Michael's injuries. These, in turn, have increased the amounts the plaintiffs pay for property taxes, homeowner's insurance, maintenance, and utilities. Some of the costs associated with the security system are also causally connected to, and necessitated by, Michael's injuries.

5. Maxine Hoover is entitled to be compensated for any time spent cleaning areas that Michael and his caregivers use that goes beyond the time for cleaning one would ordinarily expect to perform. Costs for snow removal greater than those that would regularly be spent—to provide round-the-clock access for shift nurses, for example—are attributable to Michael's needs.

6. Further development of the record under the *Griffith* framework is appropriate. A remand is proper for the parties to submit

additional evidence on each of the expenses remaining at issue. The 28 percent allocation ordered by the trial court was not legally sound and is inconsistent with the analysis under *Griffith*.

7. The defendant unreasonably refused to pay or delayed paying benefits for expenses associated with the backup generator, television monitoring system, medical alert pendant, elevator inspections, and dumpster. Attorney fees are recoverable to the extent that they relate to benefits for those expenses, and penalty interest is appropriate with respect to those items. Further review is necessary before the trial court can determine the appropriateness of additional attorney fees and penalty interest for the other items of expense. No basis currently exists for awarding the defendant attorney fees under MCL 500.3148(2) for an excessive or fraudulent claim without foundation brought by the plaintiffs.

Affirmed in part, reversed in part, and remanded for further proceedings.

SCHUETTE, P.J., concurring in part and dissenting in part, agreed that the 28 percent allocation was not legally sound and was arbitrary and that there is no basis for awarding the defendant attorney fees because the plaintiffs' claims were not fraudulent. He dissented, however, from awarding the plaintiffs benefit payments for any costs other than those for the backup generator, television monitoring system, and medical alert pendant and from the determination that the defendant unreasonably refused to pay or delayed payment of benefits for any costs other than the costs for those items. The trial court should recalculate attorney fees with respect to the items that the defendant conceded were appropriate, and interest under MCL 500.3142(2) is appropriate only for late payment regarding those items.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — FAMILY MEMBERS.

A no-fault insurer is liable to pay personal protection insurance benefits only to the extent that the benefits claimed are causally connected to the accidental bodily injury arising out of the automobile accident; in the case of items for which expenses would have been incurred even in the absence of the accident and resulting injury, a court must determine what portion is causally connected to the injury and allocate not the portion of the expenses attributable to the injured person's usage, but the portion attributable to the injured person's usage that is occurring only because of the injury (MCL 500.3105[1], 500.3107[1][a]).

C. Robert Beltz for the plaintiffs.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *William J. Brickley*), for the defendant.

Before: SCHUETTE, P.J., and MURPHY and FITZGERALD, JJ.

MURPHY, J. Defendant appeals the trial court's order awarding plaintiffs personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, for various housing and living expenses, as well as services, associated with the care of plaintiffs' adult son, Michael Hoover. Michael was injured as a child more than 20 years ago when struck by a motor vehicle operated by a drunk driver and insured by defendant. Defendant also challenges the trial court's assessment of attorney fees and penalty interest. The trial court did not properly apply, in part, our Supreme Court's opinion in *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521; 697 NW2d 895 (2005), resulting in erroneous conclusions on several, but not all, of the expenses and services at issue. Further development of the record under the framework set forth in *Griffith* is appropriate with respect to expenses and services analyzed incorrectly by the court. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

In 1985, Michael Hoover, two years old at the time, was struck by a drunk driver and suffered serious, life-altering injuries. Michael, now 25, is developmentally disabled from a brain injury and is a quadriplegic, and he depends on a ventilator to breathe, all as a result of the accident. In 2002, plaintiffs built a new home with a wing specifically constructed and designed to accommodate Michael and his injuries. Alarms monitor Michael's breathing, in-home nurses working shifts around the clock provide medical care,

he is fed puréed food (sometimes through a feeding tube), a backup generator is in place in case of a disruption in power, Michael stays and sleeps in a specialized bed, the home has an elevator for when he needs to be moved to the basement, and Michael lives in a sterile environment closely surrounded by various medical instruments and equipment. See the photograph appended to this opinion. It is beyond dispute that absent these accommodations and the care of his parents and others, Michael would need to be institutionalized.

The parties have litigated the payment of PIP benefits off and on over the years, dating back to 1986, when plaintiffs first commenced suit for the recovery of benefits. Defendant's general obligation to provide PIP benefits was settled early in the litigation, and the court has adjusted the amount of benefits payable for home-care and living expenses through the years. In 2002, plaintiffs built a specially designed house with accommodations necessary to properly care for Michael. Pursuant to a settlement agreement, defendant paid approximately 28 percent of the construction costs. Thereafter, and on the basis of language in the agreement, defendant filed a motion requesting an order canceling future benefit payments for accommodations; however, the trial court denied the motion, and that ruling is not the subject of this appeal. Subsequently, plaintiffs moved for an increase in benefits to cover home-care and living expenses, and defendant, in response, argued that there should be a reduction. The trial court ruled that 28 percent of the home could be attributed to Michael's needs. Using this allocation, the trial court ordered defendant to pay benefits covering 28 percent of the following expenses: real estate tax bills, gas and electric utility bills, homeowner's insur-

ance, home maintenance,[1] telephone bills, and security system costs. The court ordered defendant to pay 100 percent of the expenses associated with the gasoline backup generator, dumpster, medical alert pendant, television monitoring system, and inspections of the elevator. The trial court additionally ordered defendant to pay plaintiffs $15 an hour for the two hours a day generally spent cleaning Michael's section of the home, removing trash, waxing floors, and removing snow from the driveway. The trial court further ruled that plaintiffs were entitled to penalty interest under MCL 500.3142 and reasonable attorney fees under MCL 500.3148.

Whether a cost constitutes an allowable expense under MCL 500.3107(1)(a) is a question of statutory construction, subject to review de novo. *Griffith,* 472 Mich at 525-526. We review underlying factual findings for clear error. *Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008). "A trial court's finding of an unreasonable refusal to pay or delay in paying benefits will not be reversed on appeal unless the finding is clearly erroneous." *Attard v Citizens Ins Co of America,* 237 Mich App 311, 316-317; 602 NW2d 633 (1999). Our primary task in construing a statute is to discern and give effect to the intent of the Legislature. *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004). The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. *Id.* at 549.

In *Reed v Citizens Ins Co of America*, 198 Mich App 443; 499 NW2d 22 (1993), overruled by *Griffith,* this Court, in an opinion I authored, addressed a claim for

[1] The court included within this cost the expenses associated with the well, septic system, roof, structural upkeep of the home, and general maintenance and repair.

no-fault insurance benefits under MCL 500.3107(1)(a).[2] In *Reed*, a parent sought no-fault insurance coverage for room and board expenses associated with the care of her son after he was severely injured in an automobile accident and came to live with her. He required 24-hour nursing care. The son initially spent 2½ years in residential treatment facilities following the accident. *Id.* at 445. The *Reed* panel, after first observing that "family members may be compensated for the services they provide at home to an injured person in need of care," ruled:

> We see no compelling reason not to afford the same compensation under the act to family members who provide room and board. [MCL 500.3107(1)(a)] does not distinguish between accommodations provided by family members and accommodations provided by institutions, and we decline to read such a distinction into the act. Moreover, holding that accommodations provided by family members is an "allowable expense" is in accord with the policy of this state. Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is generally, we believe, less costly than institutional care. . . .
>
> We hold that, where an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide home care, a no-fault insurer is liable to pay the cost of maintenance in the home. [*Id.* at 452-453 (citations omitted).]

We are of the opinion that *Reed* was correctly decided and that it honored the language in MCL 500.3107(1)(a). We note that the Supreme Court, without dissent, denied the application for leave to appeal in

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[2] MCL 500.3107(1)(a) provides that PIP benefits are payable for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

Reed, 444 Mich 964 (1994), and the opinion stood and was accepted for 12 years until being overruled by a four-to-three decision in *Griffith*.[3]

In *Griffith*, the plaintiff's husband, Douglas Griffith, was involved in a motor vehicle accident, resulting in a severe brain injury and leaving him confined to a wheelchair. He was first treated at in-patient facilities and hospitals for two years before returning home with the plaintiff, where he required assistance with basic tasks such as bathing and eating. The insurer denied the plaintiff's claim to recoup her husband's food expenses under MCL 500.3107(1)(a) that were incurred after he returned home. *Griffith,* 472 Mich at 524-525. Relying on the language in MCL 500.3105(1)[4] and MCL 500.3107(1)(a), the Supreme Court rejected the plaintiff's claim for no-fault benefits. With respect to MCL 500.3105(1), the Court construed the language to mean that "a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident." *Id.* at 531. The Court concluded that the plaintiff's claim did not indicate that her husband's diet was different from the diet of an uninjured person, that the food expenses were incurred as part of a treatment plan, or that the food costs were related in any way to the injuries suffered in the accident. *Id.* Therefore, according to the *Griffith* Court,

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[3] We encourage our Supreme Court to revisit and reconsider its decision in *Griffith*. See *People v Mitchell*, 428 Mich 364, 370; 408 NW2d 798 (1987) (stating that the Court of Appeals may properly express its belief that a Supreme Court opinion was incorrectly decided).

[4] MCL 500.3105(1) provides, in pertinent part, that "[u]nder personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ."

the claimed food expenses were not for, nor causally connected to, an accidental bodily injury. *Id.* at 532.

Proceeding on an assumption that the food expenses could be compensated under MCL 500.3105(1), the Supreme Court then examined and rejected the plaintiff's claim under MCL 500.3107(1)(a). The Court first noted that there was no contention that the food expenses were part of the plaintiff's husband's "recovery" or "rehabilitation," as those terms are used in MCL 500.3107(1)(a), thereby narrowing the issue to whether the food expenses were necessary for his "care." *Griffith,* 472 Mich at 532-533. Addressing the interpretation of the term "care" as used in MCL 500.3107(1)(a), the Court stated:

> "Care" must have a meaning that is broader than "recovery" and "rehabilitation" but is not so broad as to render those terms nugatory. As noted above, both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to an "injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident. "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state. [*Id.* at 535.]

The *Griffith* Court, applying its definition of "care," proceeded to analyze the claim for food expenses pursued by the plaintiff:

> Griffith's food costs here are not related to his "care, recovery, or rehabilitation." There has been no evidence introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *sur-*

> *vival,* they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a). [*Id.* at 535-536 (emphasis in original).]

The Court, rejecting the plaintiff's argument that there was no difference between food costs for hospital food and the cost of food provided to an insured as part of at-home care, reasoned:

> Food costs in an institutional setting are "benefits for accidental bodily injury" and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." That is, it is "reasonably necessary" for an insured to consume hospital food during in-patient treatment given the limited dining options available. Although an injured person would need to consume food regardless of his injuries, he would not need to eat *that particular food* or bear the cost associated with it. Thus, hospital food is analogous to a type of special diet or select diet necessary for an injured person's recovery. Because an insured in an institutional setting is required to eat "hospital food," such food costs are necessary for an insured's "care, recovery, or rehabilitation" while in such a setting. Once an injured person leaves the institutional setting, however, he may resume eating a normal diet just as he would have had he not suffered any injury and is no longer required to bear the costs of hospital food, which are part of the unqualified unit cost of hospital treatment.
>
> *This reasoning can be taken a step further when considering the costs of items such as an injured person's clothing,*

> *toiletries, and even housing costs. Under plaintiff's reasoning, because a hospital provided Griffith with clothing while he was institutionalized, defendant should continue to pay for Griffith's clothing after he is released. The same can be said of Griffith's toiletry necessities and housing costs. While Griffith was institutionalized, defendant paid his housing costs. Should defendant therefore be obligated to pay Griffith's housing payment now that he has been released when Griffith's housing needs have not been affected by his injuries?* [*Id.* at 537-539 (emphasis in final paragraph added).]

It is crucially important for our purposes here to keep in mind all the language in the rhetorical question regarding housing needs posed in this passage from *Griffith*, which demands a determination whether the housing needs at issue are "affected by [one's] injuries." *Griffith* expressly overruled *Reed* on the basis that the rule announced in *Reed* was contrary to MCL 500.3105(1) and MCL 500.3107(1)(a). *Id.* at 540. As indicated earlier, the rule announced in *Reed* was that in cases "in which an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide home care, a no-fault insurer is liable to pay the cost of maintenance in the home." *Reed,* 198 Mich App at 453. However, consistent with *Griffith* and its language addressing housing needs unaffected by injuries, room and board or living expenses are not necessarily precluded from being covered by insurance benefits in their entirety in every case, such as when the expenses, because of or as affected by the injuries, go beyond or are different from what normally could be expected.[5] *Reed* in no way indicated

[5] We note that *Griffith* indicated that if Mr. Griffith had been required to eat special diet food, no-fault benefits would have covered those food costs. *Griffith* did not have to address whether there would have needed to be any adjustments in benefits on consideration of the cost of the diet food when compared to the cost of ordinary food. For example, if it cost

that the claimed room and board or living expenses were atypical, unusual, or out of the ordinary; rather, they were ordinary expenses typically associated with living in the home. *Id.* at 446 (trial court stated that benefits would not be recoverable because the "expenses would have been incurred regardless of the injury sustained"), 450 n 3 (proposed amended complaint sought reasonable accommodation expenses), and 453 (Court disagreed that "expenses that are as necessary for uninjured persons as they are for injured persons are not allowable expenses").

At its core, the holding in *Griffith* requires a court to determine whether expenses would not have been incurred *but for* the accident and resulting injuries. Stated otherwise, the question is whether the expenses would have been incurred in the course of an ordinary life unmarred by an accident. And if they would have been incurred, like the ordinary food costs at issue in *Griffith*, a causal connection between the expenses and the accidental bodily injury would be lacking and it could not be said that the act of providing products, services, and accommodations was necessitated by the accidental bodily injury. No-fault benefits would not be payable absent a link between the expenses and the injury. But if the expenses were atypical and arose solely because or out of the accidental bodily injury, a causal connection between the expenses and the injury would exist and it could be said that the act of providing products, services, and accommodations was necessitated by the accidental bodily injury. Payment of no-fault benefits to cover the expenses would be mandated in that situation.

$15 a day to feed a person preinjury, and if the daily cost of food on a special diet following the accident were still $15 a day, would a $15 daily no-fault benefit have to be paid or would no benefit be owing? *Griffith* suggests that a $15 benefit would still need to be paid.

The analysis necessarily entails a comparison between costs associated with circumstances as they actually exist, which includes reflection on a life scarred and affected by injuries sustained in an automobile accident, and costs associated with a life unscarred by injuries, which would include examination of circumstances that existed preinjury or that would in all likelihood have transpired absent the injury. Whether injured or uninjured, Michael would need, like each of us, daily sustenance and housing, thereby incurring all associated costs. The concept that defendant fails to grasp is that, even though Michael or his parents would have borne expenses for Michael's necessities had Michael not been injured, the expenses currently being incurred as a result of his injuries are, in all likelihood, more than would ordinarily have been incurred in an accident-free life.

An initial question that begs asking as part of the "but for" analysis concerns whether you take into consideration the fact that it is Michael's parents who are providing "services" and "accommodations" to Michael. Consistent with Supreme Court's tendency to use dictionaries to determine the plain meaning of statutory terms undefined in the statutory scheme, *People v Morey*, 461 Mich 325, 330-331; 603 NW2d 250 (1999), "accommodations" is defined as "lodging" or "food and lodging" and services encompass "act[s] of helpful activity . . . ." *Random House Webster's College Dictionary* (2001). Given that Michael is 25 years old, plaintiffs are not under any legal obligation as parents to pay for his food, lodging, accommodations, support, or services or to otherwise pay for his care. See generally the Support and Parenting Time Enforcement Act, MCL 552.601 *et seq*. Had Michael not been injured and were he a healthy 25-year-old man, plaintiffs would likely not be providing any accommodations and ser-

vices for him and, at a minimum, they absolutely would have no legal obligation to so provide.

A medical or nursing home facility that provides institutionalized care is likewise not obligated to provide accommodations and services, but once an undertaking is made and a patient is admitted under contract, accommodations and services are provided, as well as products, and the no-fault insurer is required to pay benefits to cover the associated costs. However, under the analysis in *Griffith*, especially considering its rejection of *Reed*, a case with many parallels to the case at bar, it appears that parents providing accommodations and services for an injured adult child, although under no legal obligation to do so, are not afforded no-fault insurance benefits to the full extent of the accommodations and services provided. This is so despite the fact that, in our opinion, there is indeed a causal connection between the accidental bodily injury and the accommodations and services. Again, plaintiffs are providing Michael with accommodations and services, which, but for the accident, they would likely no longer be providing, given his age. But in contemplating whether an expense for a particular item would have been incurred even without the accident, *Griffith* suggests that it matters not who would have incurred the expense in an accident-free life, just that it would have ordinarily been incurred.[6] Thus, for example, all costs attributable

[6] In *Griffith*, it was an elderly, married couple who sought insurance benefits for food costs. The couple would have together borne these costs regardless of the accident. The factual setting is different in this case because plaintiffs are caring for an adult child who, most likely, would otherwise be out on his own and bearing the costs of housing himself, although we cannot say that with 100 percent certainty. Ultimately, this distinction does not appear to be relevant under *Griffith*, especially given its treatment of *Reed*.

to Michael for utilities on the basis of his usage would not be recoverable because, had Michael not been injured, his activities would nonetheless have generated some level of expenses for utility usage regardless of who ultimately paid the utility bills. Under *Griffith*, an examination is required to discern the portion of the utility costs attributable to Michael that is causally connected to his injuries, which would be utility usage that goes beyond typical or ordinary usage, i.e., usage "*affected by his injuries*." *Griffith,* 472 Mich at 539 (emphasis added). In other words, a court must allocate not the portion of a utility bill attributable to the injured person's usage, but that portion of the bill attributable to the injured person's usage that is only occurring because of the injuries, e.g., power to operate Michael's ventilator. Making these calculations and ascertaining the proper allocations might prove difficult; however, *Griffith* requires such an undertaking.

We now turn to the expenses for which plaintiffs seek no-fault benefits, applying the principles enunciated. It is important to first identify the expenses at issue and those not at issue in this case. Defendant concedes that Michael is in need of "24 hour per day nursing services, widened hallways and elevators . . . , wheelchairs, ventilators, specially equipped beds, and other such amenities that [he] needs as a result of the injuries" and that "[s]uch expenses are causally related to [the] automobile accident and are covered under no-fault insurance." Defendant also concedes that the expenses associated with the backup generator should be and are fully covered by insurance, as are television monitoring and medical alert pendant expenses. Defendant challenges, however, the awarding of insurance benefits to cover, even partially, property taxes, standard utility bills, homeowner's insurance, home maintenance costs, telephone bills, dumpster expenses, elevator inspection

costs, home security system expenses, cleaning stipends paid to Mrs. Hoover for time spent cleaning Michael's area of the home, and snow removal.

It is necessary to carefully scrutinize the expenses at issue and take into account factors that have a bearing on those expenses.

With respect to property taxes, it is indisputable that plaintiffs' property taxes are affected by the value of the home, see the General Property Tax Act, MCL 211.1 *et seq.*, and it is likely that the value of the home is enhanced by certain structures and amenities therein, architectural designs, and square footage that are causally connected to, and necessitated by, Michael's accidental bodily injuries, thereby inflating the amount of property taxes owed. In regard to homeowner's insurance, it is again, in our opinion, indisputable that premiums paid for that insurance are affected by the value of the home, which in turn is affected by the home's structural design, amenities, and square footage, some of which are attributable to Michael's injuries, and the home's features in and of themselves can affect the insurance premiums. With respect to maintenance costs, some portion of those costs are likely to be causally connected to, and necessitated by, Michael's injuries, going beyond ordinary maintenance expenses related to housing a healthy adult child, when many features of the home are atypical in order to suit Michael's needs. On the issue of the utility bills, touched on earlier, they are likely higher than would normally be expected, considering the extra electricity needed to power, for example, the ventilator. If Michael were a healthy young man living in his parents' home, there would be no extra cost to power a ventilator. Additionally, the mere size of the home, some of which can be attributed to features needed to accommodate

Michael, would have a bearing on the cost to heat the home. We agree with defendant that plaintiffs would be required to pay taxes, utilities costs, homeowner's insurance premiums, and maintenance expenses irrespective of Michael's injuries; however, these costs are certainly inflated beyond what would normally be expected because of Michael's accidental bodily injuries.

With respect to the ADT security system, Mr. Hoover indicated that it is used for crime prevention and to help the nurses feel safer. Given that nurses would be unnecessary but for the accident and considering that the home contains expensive medical equipment related to Michael's care, it could be surmised that some of the costs associated with the security system are causally connected to, and necessitated by, Michael's accidental bodily injuries. We would also not be surprised if the cost of the system is greater because of the immense size of the home necessitated by features constructed to properly care for Michael. Furthermore, Mr. Hoover testified that a "panic button" for Michael was part of the ADT security system and included in the monthly bill for the system.

In regard to elevator inspection costs, the fact that plaintiffs' house even has an elevator is directly connected to, and necessitated by, Michael's injuries and, therefore, inspection and operational expenses can also be attributed to accidental bodily injury. Indeed, as quoted earlier, defendant concedes that Michael is in need of "widened hallways and elevators." Michael's need for basement access during weather emergencies by means of an elevator specifically arises because of his injuries, and defendant apparently believes that Michael has another means to access the basement during a tornado or other weather emergency or that he need not be given a safe haven. Defendant's position is

necessarily and implicitly premised on the illogical conclusion that plaintiffs would have had an elevator in their home had Michael never been injured. Furthermore, Mr. Hoover testified that a doctor ordered the elevator, and he also stated that the elevator is used to give Michael access to the basement when the family gathers down there to watch television or otherwise spend time together socially. Inspecting the elevator is a normal safety precaution, and associated costs are covered by no-fault benefits.

With respect to the dumpster, Michael alone generates numerous bags of garbage a day because of the nature of his injuries and their attendant care, which goes beyond the amount of garbage that would typically be generated by an adult child who is not afflicted with the injuries suffered by Michael. Mr. Hoover testified that most of the garbage that goes into the dumpster is generated by Michael and that without a dumpster, garbage would pile up all over the place and blow into the street.[7] Absent Michael's injuries, no dumpster would be necessary. At first glance, allocating the full amount of the dumpster cost to Michael would appear improper because plaintiffs also use the dumpster for their waste and, even if injury-free, Michael would generate some waste. However, this issue is somewhat analogous to the food expense issue in *Griffith*. Just as daily sustenance can be accomplished by eating an ordinary diet or a special diet, garbage removal can be accomplished by using a standard trash can set out at the curb or by use of a dumpster, something typically relegated to use by restaurants and businesses because of the quantity of waste generated. Consistent with our

[7] Mr. Hoover stated that "you could get a pickup truck load in one day of Michael's stuff . . . ." He testified that about 80 percent of the garbage in the dumpster comes from Michael.

thoughts expressed in footnote 5 of this opinion, *Griffith* indicates that special diet food would be a fully covered expense regardless of how it compares to the cost of daily sustenance ordinarily incurred. *Griffith,* 472 Mich at 537-538. Thus, even though some garbage removal costs can be attributed to plaintiffs, along with costs Michael would have ordinarily incurred in an accident-free life, the dumpster, like special diet food, is fully covered because it was necessitated by accidental bodily injury.

On the issue of benefits to cover stipends for Mrs. Hoover related to cleaning Michael's living area, parents of a healthy adult child might clean up after the child, they might make the child clean up after himself, or the parents and child might share the cleaning duties. What is abundantly clear here is that Michael's incapacity does not allow him to clean up after himself and that the needed cleaning goes beyond cleaning that would ordinarily be expected.[8] Part of Mrs. Hoover's cleaning time is spent taking care of messes created as the nurses provide care for Michael, which, but for the accident, would not be necessary. She also testified that she cleans daily to make sure that Michael's room is "dust free," which is understandable given Michael's susceptibilities to infection or illness. We conclude that Mrs. Hoover is entitled to be compensated for any time spent cleaning areas used by Michael and his caregivers that goes beyond the time for cleaning that one would ordinarily expect to perform. With respect to snow removal costs, Mr. Hoover testified that part of the need to clear the driveway as often as it is done is because of

[8] "[W]e long ago recognized that family members should be compensated for the services they provide at home to an injured person in need of care." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 167; 761 NW2d 784 (2008).

the fact that shift nurses are coming and going around the clock and ingress or egress is required. Any costs greater than those that would regularly be spent on snow removal are to be attributed to Michael's needs.

In regard to telephone bills, the evidence was unclear, such that we cannot render any assessment of the issue.

We conclude that a remand is proper for the parties to submit additional evidence on each of the expenses remaining at issue in order to give them an opportunity to properly present arguments under the analytical framework outlined here and as required by *Griffith*. At the time of the hearing on plaintiffs' motion to increase benefits, during which the parties and court agreed to have the case decided on documentary evidence submitted to the court, *Griffith* had not yet been decided. Moreover, the approach taken by *both* parties was to have the court simply allocate the expenses, across the board, on the basis of the percentage of the home devoted to Michael's use, which would then be multiplied by the particular bill covering the entire home. The parties disagreed on the percentage of the home devoted to Michael's use, and that was the focus during much of the litigation below. Plaintiffs did indeed submit bills, statements, and other evidence of the expenses. We conclude that remand for further development of the record under *Griffith* guidelines is proper.

We do agree with defendant that the 28 percent allocation ordered by the trial court was not legally sound, and it is inconsistent with our analysis, although the court's decision was understandable from a practical standpoint considering the difficulties in making technical allocations for each item of cost and the desire to simplify matters. Despite the difficulties in making the necessary assessments, we reverse with respect to the expenses that were given a 28 percent allocation

entitled to payment of benefits for any costs other than those for the backup generator, television monitoring system, and medical alert pendant service. I also respectfully dissent from the majority's determination that defendant unreasonably refused to pay or delayed payment of benefits for any costs other than those for the generator, television monitoring system, and medical alert pendant service. Therefore, I would reverse and remand for recalculation of the awards to which plaintiffs are entitled.

Under the *Griffith* Court's interpretation of MCL 500.3105(1) and 500.3107(1)(a), an insured's housing costs are compensable if they are affected by accidental injuries arising out of the operation of a motor vehicle and are reasonably necessary for the insured's "care, recovery, or rehabilitation." *Id*. at 530.

At the outset, I agree with the majority that the trial court erroneously allocated 28 percent of the cost of plaintiffs' home as directly related to Michael's custody and care. In arriving at 28 percent, the trial court relied on the parties' agreement on accommodations and found that defendant had contributed $200,000 toward construction costs of the handicap-accessible home—or roughly 28 percent of the total cost of the $700,000 home. However, this figure merely represents a settlement agreement between the parties regarding defendant's contribution to construction costs for "any and all accommodations reasonably necessary for Michael Hoover's care, recovery and rehabilitation." The fact that nearly 28 percent of the construction costs related to accommodations for Michael does not mean that 28 percent of the home is apportioned to Michael or that care related to Michael's injury constitutes 28 percent of the cost of certain items for which the court awarded benefits. Similarly, despite plaintiffs' assertion that 28

percent is the proper apportionment because Michael uses 2,000 square feet of the 7,200-square-foot home, the amount of space Michael uses cannot alone account for the apportionment of the home related to care for his injuries that resulted from the accident. Indeed, Michael would require space to live in a house regardless of the injuries he sustained in the accident. In other words, the expense of living in a house is not, by itself, causally related to the injuries at issue. Consequently, the trial court improperly attributed 28 percent of the home to Michael's needs.

Given this, the court's awards apportioned at 28 percent were arbitrary. First, the award of 28 percent of plaintiffs' real estate taxes in no way accounts for the home's appraisal value. The fact that defendant contributed 28 percent of the cost of the home does not explain the extent to which facilities constructed for care of Michael's injuries caused by the accident affected the tax appraisal. Second, no evidence was presented concerning the percentage of plaintiffs' utility bills, maintenance costs (including those for a water softener, well, septic system, the roof, structural maintenance, and general maintenance and repair), and telephone bills that are attributable to Michael's care necessitated by his injuries. Indeed, irrespective of his injuries, plaintiffs would be required to pay taxes, utilities, maintenance costs, and telephone bills.

Further, allocation of 28 percent of the security system expenses and homeowners insurance to defendant was wholly improper. Regarding the security system, Rodney Hoover testified that this system is used for crime prevention and helps Michael's nurses feel safer. The system is not reasonably necessary for

Michael's care, recovery, or rehabilitation.[1] Similarly, homeowner's insurance is completely unrelated to Michael's care, recovery, or rehabilitation. Again, plaintiffs would bear the cost of that insurance irrespective of his injuries.

Moreover, the trial court improperly awarded plaintiffs 100 percent of the costs of the dumpster, elevator maintenance, Maxine Hoover's cleaning, and snow removal. First, although Michael generates two to three bags of garbage a day, the court's finding that the dumpster is "solely for Michael's waste" was clearly erroneous given Rodney's testimony that this expense covers waste removal for the entire household, as well as testimony that use of the dumpster is also necessitated by the fact that the house is 2,500 feet from the road. Use of the dumpster is not reasonably necessary for Michael's care, recovery, or rehabilitation. Second, regarding the elevator maintenance costs, although Rodney testified that the elevator permits Michael access to the basement in the event of a weather emergency, the need for access to a basement because of weather conditions is not causally related to Michael's injuries. Third, while Maxine explained that she performs "serious" daily cleaning of Michael's room (including vacuuming, mopping and sweeping floors, and cleaning the tub, walls, and windows), evidence was not presented that this cleaning is causally related to Michael's injuries. Further, Maxine admitted that a portion of her cleaning results from the mess left by Michael's nurses. Moreover, removing snow from a driveway is completely unrelated to the injuries at

[1] Rodney testified that the ADT security system was used predominantly to "keep an eye on Michael." However, in context, it appears that Rodney was referring to the television monitoring system, also provided by ADT. Defendant does not dispute the court's award for that expense.

issue. Indeed, plaintiffs would need to remove snow from the driveway irrespective of Michael's injuries. Consequently, the only benefits I find the trial court properly awarded were those for the backup generator, television monitoring system, and medical alert pendant services.

Further, I agree with defendant that the court erred in awarding plaintiffs attorney fees and penalties and in failing to address defendant's request for attorney fees.

> The no-fault act provides for attorney fees when an insurance carrier unreasonably withholds benefits. The trial court's decision about whether the insurer acted reasonably involves a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact. [*Ross v Auto Club Group*, 481 Mich 1, 7; 748 NW2d 552 (2008).]

A trial court's award of interest under the no-fault statute is reviewed de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999).

Under MCL 500.3148(1), an attorney representing a claimant may recover fees when an insurer's personal protection insurance benefits payment is overdue, and the fee "shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." "When determining whether attorney fees are warranted for an insurer's delay to make payments under the no-fault act, a delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Attard*, *supra* at 317.

With the exception of payments that defendant concedes plaintiffs legitimately claimed (i.e., payments for

the generator, television monitoring system, and medical alert pendant service), defendant did not unreasonably delay payments. Indeed, as noted earlier, factual uncertainty existed regarding the 28 percent apportionment of the house as directly related to care for Michael's injuries. Additionally, plaintiffs were not entitled to benefits for the costs of the security system, homeowner's insurance, the dumpster, elevator maintenance, Maxine's cleaning, and snow removal. Thus, I believe that the trial court should recalculate attorney fees with respect to the items that defendant conceded were appropriate.

Defendant also contends that the trial court erred in awarding plaintiffs interest under MCL 500.3142(2). I agree in part. "[T]he no-fault interest statute requires an insurer to pay simple interest of twelve percent for personal protection insurance benefits that are not paid within thirty days 'after an insurer receives reasonable proof of the fact and of the amount of loss sustained.' " *Attard*, *supra* at 319, quoting MCL 500.3142(2). "[N]o-fault interest is intended to penalize an insurer that is dilatory in paying a claim." *Attard, supra* at 319. As noted earlier, defendant was only dilatory in providing benefit payments for the generator, television monitoring system, and medical alert pendant service after notice was provided within the statutory time frame. Whether defendant owed additional payments was, at best, uncertain. Thus, interest was only appropriate for late payment regarding these items.

I would reverse and remand for the trial court to award costs and recalculate attorney fees and penalties.

THORN v MERCY MEMORIAL HOSPITAL CORPORATION

Docket No. 277935. Submitted September 10, 2008, at Detroit. Decided December 11, 2008, at 9:10 a.m. Leave to appeal sought.

Marchelle L. Thorn, personal representative of the estate of Laurie A. Greene, deceased, brought a wrongful death action in the Monroe Circuit Court against Mercy Memorial Hospital Corporation and others, alleging that the decedent died as a result of the defendants' medical malpractice. The court, Joseph A. Costello, Jr., J., granted the defendants' motions to exclude the plaintiff's claim for economic damages for loss of services the decedent had provided to her minor children, ruling that the term "including" in MCL 600.2922(6) limited an award of damages in a wrongful death action to only the categories of damages explicitly delineated in the statute and that, because damages for loss of services were not explicitly delineated, the jury could only consider loss of services as noneconomic damages within the context of loss of society and companionship. The plaintiff appealed by leave granted.

The Court of Appeals *held*:

1. The term "including" in MCL 600.2922(6), when viewed in context, indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts. The statute provides specific examples, not an exhaustive list, of the types of damages available in a wrongful death action.

2. When awarding damages in a wrongful death action based on medical malpractice, there must be an initial determination regarding the full extent of the fair and equitable damages available to the plaintiff and a subsequent reduction or limitation of those damages based on the applicability of the damages cap in MCL 600.1483.

3. The wrongful death act recognizes the availability of damages for loss of services.

4. Damages for loss of services are economic damages and are separate and distinguishable from compensation for the loss of society and companionship. Loss of services is not merely a

component of a claim for the loss of society and companionship or the equivalent of a claim for loss of consortium.

5. The plaintiff's claim for loss of services is a claim for economic damages, which is not subject to the noneconomic damages cap of MCL 600.1483.

Reversed and remanded for further proceedings.

1. TORTS — WRONGFUL DEATH — DAMAGES.

The wrongful death act permits an award of any type of damages, economic or noneconomic, deemed justified by the facts; the act provides specific examples of the types of damages available, not an exhaustive list of the damages available (MCL 600.2922[6]).

2. TORTS — WRONGFUL DEATH — LOSS OF SERVICES — DAMAGES.

Damages for loss of services may be awarded under the wrongful death act; such damages are economic damages that are separate and distinguishable from compensation for the loss of society and companionship or for loss of consortium; economic damages for loss of services are not subject to the cap on damages for noneconomic loss applicable to wrongful death actions based on medical malpractice (MCL 600.1483[1]; MCL 600.2922[6]).

Turner & Turner, P.C. (by *Lee I. Turner*) (*Bendure & Thomas*, by *Mark R. Bendure*, of counsel), for Marchelle L. Thorn.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Susan Healy Zitterman* and *Cheryl A. Cardelli*) for Mercy Memorial Hospital Corporation and Blessing B. Nwosu, M.D.

Tanoury, Corbet, Shaw, Nauts & Essad, P.L.L.C. (by *William A. Tanoury* and *Anita Comorski*), for Kianoush Khaghany, M.D., and S. Ahadi, M.D., P.C.

Kerr Russell and Weber PLC (by *Daniel G. Beyer* and *Joanne Geha Swanson*) for Tanvir Iqbal Qureshi, M.D.

Before: WILDER, P.J., and MARKEY and TALBOT, JJ.

TALBOT, J. In this wrongful death action, plaintiff appeals by leave granted the trial court's order granting defendants' motions to strike plaintiff's claim of economic damages for the loss of household services. We reverse and remand.

I. BACKGROUND

Plaintiff, the personal representative of the estate of Laurie Ann Greene, deceased, contends that the medical malpractice committed by defendants Mercy Memorial Hospital Corporation (MMHC), Blessing B. Nwosu, M.D., S. Ahadi, M.D., P.C., Kianoush Khaghany, M.D., and Tanvir Iqbal Qureshi, M.D., resulted in the decedent's bleeding to death from the site of a Caesarean section. Plaintiff sought to recover damages pursuant to the wrongful death act (WDA), MCL 600.2922, including the economic value of household services the decedent had provided to her minor children. To develop an estimate of the replacement cost for these household services, plaintiff retained Dr. Nitin Parajpne as an expert in the field of economics. Parajpne opined that the cost to replace the services lost to the decedent's children was $1.45 million.

Defendants filed motions seeking to preclude plaintiff's claim for economic damages for the loss of household services and to exclude testimony by plaintiff's expert. Defendants argued that the language of MCL 600.2922(6) does not specifically list loss of services as a recoverable element of damages. Alternatively, defendants contend that plaintiff's claim for loss of services is merely a factor included in the damages for loss of society and companionship and is, therefore, noneconomic in nature and subject to the damages cap of MCL 600.1483.

Plaintiff responded that the language of MCL 600.2922(6) does not require a claim for damages to fit one of the categories of losses specifically enumerated in the statute. Rather, the statutory language, when considered fully and in context, demonstrates that the types of damages listed are intended to be examples and not limitations on recovery. In addition, plaintiff asserted that damages for loss of services are quantifiable and, therefore, should not be construed as being commensurate with the noneconomic compensation available for the more esoteric damages incurred for loss of society and companionship. Consequently, plaintiff argues that any such damages are not subject to the caps set forth under MCL 600.1483. Citing earlier versions of the WDA, plaintiff noted that the statute has historically permitted recovery for loss of services as a "pecuniary" injury even though the statute did not allow for the recovery of damages for loss of society and companionship until its amendment in 1971. Plaintiff also points to the language of M Civ JI 45.02, which specifically includes "loss of service" as a compensable damage, in addition to those items listed in MCL 600.2922(6).

The trial court granted defendants' motions on the basis of its interpretation of the language of MCL 600.2922(6). The trial court read the term "including" within the statute's language to be one of limitation, restricting recovery to only the categories of damages explicitly delineated. However, the trial court ruled that the jury could consider loss of services as noneconomic damages within the context of loss of society and companionship.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *City of Taylor v Detroit*

Edison Co, 475 Mich 109, 115; 715 NW2d 28 (2006). As a preliminary matter, we note that the trial court failed to identify the specific subsection of MCR 2.116 under which it granted defendants' motions. Because the ruling reflects the trial court's determination that plaintiff's claim for damages for loss of services is not recognized or included within the statutory language of MCL 600.2922(6), we review this matter as having been decided pursuant to MCR 2.116(C)(8). *Spiek v Dep't of Transportation,* 456 Mich 331, 338 n 9; 572 NW2d 201 (1998). A dispositive motion premised on MCR 2.116(C)(8) is based on the allegations set forth in the pleadings and operates to test the legal sufficiency of the complaint. *Feyz v Mercy Mem Hosp,* 475 Mich 663, 672; 719 NW2d 1 (2006). "When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id.* Statutory interpretation presents a question of law that this Court also reviews de novo. *Dessart v Burak,* 252 Mich App 490, 494; 652 NW2d 669 (2002).

III. ARGUMENTS

A. STATUTORY LANGUAGE

Defendants initially contend that the wording of MCL 600.2922(6) precludes the consideration of damages for loss of services in a wrongful death action. It is well recognized that legislative intent is determined by first looking at the language of a statute to ascertain and give effect to the intent of the Legislature. *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002). Therefore, to resolve this issue, we must first review the wording of MCL 600.2922, which provides, in relevant part:

> (1) Whenever the death of a person, injuries resulting in death, or death as described in section 2922a shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death as described in section 2922a, and although the death was caused under circumstances that constitute a felony.
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> * * *
>
> (6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Unless defined in the statute, every word or phrase of the statute should be read in accordance with its plain and ordinary meaning. MCL 8.3a.[1] Language of a statute must be applied as it is written and nothing should be read into the meaning of the statutory language that is not within the intent of the Legislature as determined from the statute itself. In other words, "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *DLF Trucking Inc v Bach,* 268 Mich App 306, 310-311; 707 NW2d 606

[1] MCL 8.3a states, in relevant part: "All words and phrases shall be construed and understood according to the common and approved usage of the language."

(2005) (quotation marks and citation omitted). The difficulty, which ensues, arises from use of the word "including" in MCL 600.2922(6).

Defendants contend that "including" is a term of limitation and that the list of damages provided following that term is inclusive and restrictive. In contrast, plaintiff asserts that the term "including" demonstrates the intent of the Legislature to provide a nonexhaustive list of examples of the types of damages recoverable under the WDA. Unfortunately, merely resorting to a dictionary definition of this term is not dispositive regarding the meaning of the statutory language. As previously noted by this Court, "[w]hen used in the text of a statute, the word 'includes' can be used as a term of enlargement or limitation, and the word in and of itself is not determinative of how it is intended to be used." *Rickwalt v Richfield Lakes Corp,* 246 Mich App 450, 469; 633 NW2d 418 (2001) (quotation marks and citation omitted). In accordance with the recognized rules of statutory interpretation,

> "[a]s far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." . . . [I]n defining particular words in statutes, we must "consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " [*Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008) (citations omitted).]

Consequently, we must ascertain the meaning of this term by examining its use and placement within the context of the statute.

The word "including" is directly preceded in the statutory subsection by the following language: "In every action under this section, the court or jury *may*

award damages as the court or jury *shall consider fair and equitable, under all the circumstances* . . . ." (Emphasis added.) When viewed in context, rather than as a solitary term, the word "including" indicates an intent by the Legislature to permit the award of any type of damages, economic and noneconomic, deemed justified by the facts of the particular case. As such, the term "including" should be construed as merely providing specific examples of the types of damages available, and not an exhaustive list. To view the term in the limiting manner urged by defendants would result in an internal contradiction. Interpreted in the manner suggested by defendants, the statutory language would mandate both the award of damages "consider[ed] fair and equitable, under all the circumstances" while simultaneously limiting a plaintiff's recovery only to those items specified in the list following the term "including." We find that such an interpretation conflicts with our rules of statutory interpretation that preclude construing terms beyond their "plain and ordinary meaning" and would render the expansive language preceding use of the term either "surplusage" or "nugatory." *Ammex, Inc v Dep't of Treasury,* 273 Mich App 623, 648-649; 732 NW2d 116 (2007).

As additional support for their interpretation of the statute, defendants cite previous rulings involving MCL 600.2922(6) indicating that only those damages specifically delineated in MCL 600.2922(6) can be recovered in a wrongful death action. In *Tobin v Providence Hosp,* 244 Mich App 626, 638-639; 624 NW2d 548 (2001), while not engaging in an analysis of the statute, this Court ruled, "In a wrongful death action, MCL 600.2922; MSA 27A.2922 limits damages to [those categories specifically enumerated under MCL 600.2922(6)]." More recently, when discussing statutory and common-law limitations applicable to "the under-

lying claim" in a wrongful death action, our Supreme Court, in a minimal and cursory statement, indicated that "MCL 600.2922(6) sets forth the damages available in wrongful death actions . . . ." *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 90; 746 NW2d 847 (2008).[2]

By extrapolation, defendants also rely on rulings precluding awards for exemplary damages premised on the absence of language in MCL 600.2922(6) permitting this type of recovery. For example, in *Fellows v Superior Products Co*, 201 Mich App 155; 506 NW2d 534 (1993), this Court determined that "exemplary damages are not recoverable in a wrongful death action" in light of prior rulings of the Michigan Supreme Court, which construed MCL 600.2922 as " 'provid[ing] the

[2] Although we note that this Court is "not bound to follow a federal court's interpretation of state law," *Doe v Young Marines of the Marine Corps League*, 277 Mich App 391, 399; 745 NW2d 168 (2007), this narrow construction of MCL 600.2922 has continued in the federal courts. By way of example, in *Frontier Ins Co v Blaty*, 454 F3d 590, 598-599 (CA 6, 2006), the court, citing MCL 600.2922 in applying "Michigan's civil damages laws" to address a complaint seeking relief for an infant's "loss of enjoyment of life" caused by death, stated, in relevant part:

> In Michigan, "[t]here is no common-law right to recover damages for a wrongfully caused death." As a statute in derogation of the common law, the wrongful death act "must be narrowly construed so that only those damages explicitly provided for in the act are recoverable."
>
> The wrongful death act provides for three categories of damages: (1) "reasonable medical, hospital, funeral, and burial expenses for which the estate is liable," (2) "reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death," and (3) "damages for the loss of financial support and the loss of the society and companionship of the deceased." [Citations omitted.]

See, also, *Brereton v United States,* 973 F Supp 752, 755 (ED Mich, 1997); *Kemp v Pfizer, Inc,* 947 F Supp 1139, 1145 (ED Mich, 1996).

exclusive remed[y] for those injuries which result in death' " and concluded that the statute " 'does not provide for punitive or exemplary damages.' " *Fellows, supra* at 157-158, quoting *In re Disaster at Detroit Metro Airport*, 750 F Supp 793, 805 (ED Mich, 1989), citing *Endykiewicz v State Hwy Comm*, 414 Mich 377, 387-388; 324 NW2d 755 (1982),[3] and *Courtney v Apple*, 345 Mich 223, 228; 76 NW2d 80 (1956).

Reviewing the caselaw defendants proffer, we conclude that these rulings are primarily dicta and are not dispositive of the issue presented in this litigation. Although defendants are correct regarding the preclusion of exemplary damages under the WDA, exemplary damages are not precluded on the basis that the wording of the statute fails to specifically reference them. Rather, exemplary damages are precluded solely because these damages "will not be awarded to compensate a purely pecuniary grievance susceptible to full and definite monetary compensation." *Jackson Printing Co, Inc v Mitan,* 169 Mich App 334, 341; 425 NW2d 791 (1988). Consequently, the basis for the preclusion of exemplary damages cannot be generalized or extrapolated to a claim of loss of services.

In contrast to the caselaw relied on by defendants, we note that our Supreme Court has issued numerous rulings expressing an expansive interpretation of the damages available under the WDA. By way of example, when interpreting the survivor benefits provisions of the no-fault act, MCL 500.3108, the Michigan Supreme Court found guidance in MCL 600.2922. Specifically, the Court stated, in relevant part:

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[3] Overruled in part, *Wesche, supra* at 91.

> Thus, it appears that the Legislature's use of the language "contributions of tangible things of economic value" in § 3108 indicates an intent that survivors' loss benefits should at least roughly correspond to economic loss damages recoverable under our wrongful death act. MCL 600.2922; MSA 27A.2922.
>
> Under our wrongful death act, a survivor's recoverable *economic losses include*, at a minimum, *the loss of financial support* from the deceased *and the loss of services* that the survivor would have received from the deceased had he lived. . . .
>
> To the extent that survivors' loss benefits are intended to be analogous to wrongful death act economic loss damages, it is important to keep in mind that wrongful death act damages focus upon the financial loss actually incurred by the survivors as a result of their decedent's death. [*Miller v State Farm Mut Automobile Ins Co,* 410 Mich 538, 560-561; 302 NW2d 537 (1981) (emphasis added and omitted).]

See, also, *Gauntlett v Auto-Owners Ins Co,* 242 Mich App 172, 179-180; 617 NW2d 735 (2000). Similarly, in *Shinholster v Annapolis Hosp*, 471 Mich 540, 545-546; 685 NW2d 275 (2004), the Court discussed the effect of MCL 600.6304, which permits consideration of a plaintiff's own pretreatment negligence to offset a defendant's fault in a claim for medical malpractice and the applicability of the damages cap, MCL 600.1483, to a wrongful death action. In reviewing the scope of MCL 600.1483, the Court stated:

> [W]e believe that the text of the wrongful death act, MCL 600.2922(1), (2), and (6), provides additional support for our understanding of § 1483. . . . [W]hile we agree with the Chief Justice that the Legislature is free to make "a policy decision that the survivors of dead medical malpractice victims are entitled to lesser damages than are living medical malpractice victims who are suffering from one of the three types of permanent conditions enumerated in

> [§ 1483],” we see no indication in the statute that the Legislature, in fact, made such a decision; rather, we believe that the Legislature made a quite contrary policy decision in § 2922(1), (2), and (6) by *permitting a decedent's estate to recover everything* that the decedent would have been able to recover had she lived. [*Shinholster*, *supra* at 564 (citation omitted; emphasis added and omitted).]

In *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), our Supreme Court specifically addressed the compatibility of the WDA, MCL 600.2922, and the noneconomic damages cap, MCL 600.1483, in medical malpractice. The Court noted:

> Clearly, the wrongful death act is not the only act that is pertinent in a wrongful death action. “The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called ‘death act’, MCL 600.2922; MSA 27A.2922, does not change the character of such actions except to *expand the elements of damage available*.” That is, a wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent. [*Jenkins, supra* at 165-166 (citation omitted; emphasis added).]

The Court further indicated that the existence of a damages cap did not impede or constrain a jury's determination of damages. Specifically:

> Although § 1483 reduces the damages awarded by the trier of fact, it does nothing to impinge upon the trier of fact's ability to determine an amount that is “fair and equitable.” That is, § 1483 does not diminish the ability of the trier of fact to render a fair and equitable award of damages; it merely limits the plaintiff's ability to recover the full amount awarded in cases where the cause of action is based upon medical malpractice and the amount exceeds the cap. [*Jenkins, supra* at 172.]

The clear implication of these rulings is that when awarding damages in a wrongful death action based on medical malpractice there must be (a) an initial determination regarding the full extent of damages available to the plaintiff deemed "fair and equitable" and (b) a subsequent reduction or limitation of those damages on the basis of the applicability of MCL 600.1483.[4]

Historically:

> "The present wrongful death act is an amalgamation of the remedies previously existing under the wrongful death and survival acts. . . . The language of the statute requiring that the decedent must have been able to maintain the action, 'if death had not ensued,' has remained in the act throughout its legislative history." [*In re Haque*, 237 Mich App 295, 306; 602 NW2d 622 (1999) (citations omitted).]

As such, "the wrongful-death act is essentially a 'filter' through which the underlying claim may proceed." *Wesche, supra* at 88, citing *Hardy v Maxheimer,* 429 Mich 422, 439; 416 NW2d 299 (1987). This is consistent with other statutory provisions pertaining to the WDA, such as MCL 600.2921, which states: "All actions and claims survive death." See, also, *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 434; 329 NW2d 729 (1982).

This Court in *Hebert v Cole,* 115 Mich App 452, 456; 321 NW2d 388 (1982), in discussing the history of the WDA, recognized that "[a]fter the 1971 amendment and *Smith* [*v Detroit,* 388 Mich 637; 202 NW2d 300 (1972)], it has been *unquestioned* that the wrongful death act *permits recovery for the loss of services and companionship*." (Emphasis added). Citing the manda-

[4] "Only after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to [MCL 6304(5)], apply the noneconomic damages cap of § 1483." *Jenkins, supra* at 172.

tory language of MCL 600.2922(1) contained at that time that "all actions for a wrongful death 'shall be brought only under this section,' " the *Hebert* Court noted that this requirement necessitated the bringing of an action for "loss of services" under the WDA, and not as a separate action, *Hebert, supra* at 457.

Defendants' position is also contrary to caselaw involving earlier versions of the WDA, which did not recognize loss of society and companionship but did permit recovery for loss of services as pecuniary damages. In addressing a parent's right to recover for the loss of a minor child, our Supreme Court held:

> " 'Only pecuniary damages can be recovered in such actions as this. Nothing can be given as solace or for bereavement suffered. . . . It is not indispensable that there should be proof of actual services of pecuniary value rendered to next of kin, nor that any witness should express an opinion as to the value of services that may have been or might be rendered. Where the deceased was a minor, and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation, under the statute, may be given.' " [*Courtney, supra* at 244, quoting *Black v Michigan C R Co,* 146 Mich 568, 574; 109 NW 1052 (1906), quoting *City of Chicago v Hesing*, 83 Ill 204, 206-207 (1876).]

Similarly, in *Thompson v Ogemaw Co Bd of Rd Comm'rs,* 357 Mich 482, 488; 98 NW2d 620 (1959), the Court interpreted the WDA and held, "The statute and Michigan case law interpreting it allow consideration of loss of services of a minor in determining pecuniary injury of a parent." In *Wycko v Gnodtke,* 361 Mich 331, 339; 105 NW2d 118 (1960), the Court recognized that "[t]he pecuniary value of a human life is a compound of many elements" and that "an individual member of a family has a value to others as part of a functioning social and economic unit." Relying on *Wycko* as author-

ity, this Court recognized that "adult children may recover from the tort-feasor for the unlawful death of a parent where loss of love, companionship and guidance have been proven," and indicated:

> It has been the law in Michigan for a number of years that in an action under the death act, as amended, for damages arising because of the death of the wife, the husband is entitled to recovery for the loss of her services. . . .
>
> . . . The same elements of pecuniary injury plus loss of services of the wife . . . were also submitted as proper to be considered by the jury as a loss to the husband in assessing damages. [*Westfall v Venton,* 1 Mich App 612, 621-622; 137 NW2d 757 (1965).]

Earlier, in *Zolton v Rotter,* 321 Mich 1, 10; 32 NW2d 30 (1948), the Court addressed the scope of pecuniary damages available under the WDA and ruled, in relevant part:

> Although, under the death act . . . recovery is limited to those persons entitled to support from decedent, recovery is not limited to the amount of support actually received. The amended act is at least as broad in protecting recovery on behalf of minor children as the original act. And in spite of the rule just stated, a husband is still entitled to recovery for loss of his wife's services, apart from any earning capacity which she may or may not have had. [Citations and emphasis omitted.]

As discussed earlier in this opinion, the evolution of the WDA demonstrates that the statute has consistently been found to recognize the availability of damages for loss of services and that the various amendments of the statute have served to expand, rather than limit, the damages available to litigants.

Procedurally, defendants also ignore the fact that the WDA does not comprise an independent cause of action. In overruling *Endykiewicz*, the Court determined

that "*Endykiewicz* was incorrectly decided because it erroneously treated a wrongful-death claim as a 'new' cause of action rather than a continuation of the decedent's underlying claim." *Wesche, supra* at 91 n 13. Specifically, the Court recognized:

> "[S]ince 1846 the law in Michigan has evolved to the point where it may now be held that the right to recovery for wrongful death 'survives by law.' *Consequently, a wrongful death action will no longer be regarded as one created at the time of death, but as one that 'survives by law.'* " [*Id.* at 89 (citation omitted; emphasis in original).]

As a result, the Court has ruled that "any statutory or common-law limitations on the underlying claim apply to the wrongful-death action." *Id.* Because the WDA is derivative in nature, *id.* at 90, 91 n 13, the result urged by defendants is inconsistent with the directives of our Supreme Court. For symmetry and continuity, if "the limitation on damages . . . must apply in [a] wrongful-death action," so too must the damages that are available in the underlying claim be recognized. *Id.* at 91. Consequently, the damages listed in MCL 600.2922(6) cannot be construed as exhaustive.

Further, when viewed in the context of the statutory scheme for medical malpractice, defendants' position is logically inconsistent with MCL 600.1483(1), which increases the cap for noneconomic damages when a more serious or permanent and irreparable injury is incurred.[5] Defendants assert that the most serious injury, which results in death, serves to restrict and

[5] MCL 600.1483(1) raises the damages cap for medical malpractice from $280,000 to $500,000 for noneconomic loss when the injury incurred results in (a) "a total permanent functional loss of 1 or more limbs" because of brain or spinal cord injury, (b) "permanently impaired cognitive capacity," or (c) "permanent loss of or damage to a reproductive organ resulting in the inability to procreate."

prohibit claims that would be compensable had the individual survived. Common sense would dictate the opposite—the more egregious the injury, the greater the damages. Any other result would be contrary to the history of litigation in this area of the law, which sought to assure that wrongdoers would be held accountable to their victims. As discussed by Justice SMITH in his dissent in *Courtney* reviewing the inequities of the common law and the historical development of actions permitting compensation for a wrongful death:

> Despite the reasoning of the common-law logicians, our people could not understand this: A wrongdoer who brought his victim to the very brink of human dissolution would have to respond in damages to the full extent of the injury. But if he took the final step and plunged his victim into the abyss, he obtained absolution from damages. No amount of talk about the sanctity, the incalculable value, of human life could justify a result which denied the very value the words proclaimed. [*Courtney, supra* at 239 (SMITH, J., dissenting).]

We find it inconceivable, as argued by defendants, that a child would be precluded from recovering damages for loss of services stemming from the parent-child relationship following the harsher and irreversible outcome of a parent's death, but that these same damages would be recoverable by a parent who is injured but survives. Such a position is inconsistent with the stated purpose of the WDA, MCL 600.2921, to assure that "[a]ll actions and claims survive death," and contrary to the language of MCL 600.2922(1). The statutory language leads to the inescapable conclusion that the intervention of death neither limits nor precludes the type of damages that could have been recovered by the person had the person survived the injury. The cost of replacement services is a well-recognized component of damages that is recoverable by a person injured because

of medical malpractice. Consequently, because the claim survives a decedent's death, a claim for loss of services must also be available in an action for wrongful death. In light of the statutory language and the cases cited earlier in this opinion there is no valid argument that a claim for loss of services is precluded by statutory language.[6]

Finally, with regard to the interpretation of MCL 600.2922(6), we address the trial court's rejection of plaintiff's argument regarding the reference to "loss of service" in M Civ JI 45.02 in support of its inclusion as an element of damages. Although we recognize that these standard instructions are not given the force and effect of the court rules, the instructions do constitute the work of a committee created by our Supreme Court and, therefore, are entitled to some level of deference. *Taylor v Michigan Power Co,* 45 Mich App 453, 457; 206 NW2d 815 (1973). Inclusion of "loss of service" within this instruction is consistent with our Supreme Court's determination that the existence of the medical malpractice damages cap delineated in MCL 600.1483 "does not diminish the ability of the trier of fact to render a fair and equitable award of damages; it merely limits the plaintiff's ability to recover the full amount awarded in cases where the cause of action is based upon medical malpractice and the amount exceeds the cap." *Jenkins, supra* at 172.

B. LOSS OF SOCIETY AND COMPANIONSHIP

Unwilling to rely solely on a statutory language argument, defendants also assert an alternative, and

[6] We do not intend this ruling to address defendants' ancillary assertion regarding the admissibility of testimony and evidence proffered by plaintiff's expert in support of this damages claim. The admissibility of the challenged expert's testimony is for the trial court to determine.

seemingly contradictory, position. Defendants contend that damages for loss of services are available but fall strictly under the umbrella of loss of society and companionship. Defendants argue that loss of society and companionship is defined in the same manner, and encompasses the same criteria or elements, as loss of consortium and, as such, is noneconomic in nature and, therefore, subject to the damages cap of MCL 600.1483. Defendants' characterization is inaccurate and oversimplifies these terms or concepts.

While loss of society and companionship and loss of consortium share certain components and have often been erroneously used interchangeably, defendants are incorrect in asserting that the terms are equivalent in meaning. Loss of consortium is typically construed to encompass two aspects of the marital relationship—the loss of support and the loss of society. " 'Loss of consortium technically means the loss of conjugal fellowship. However, it is legally recognized as including loss of society, companionship, service, and all other incidents of the marriage relationship.' " *Kucken v Hygrade Food Products Corp,* 51 Mich App 471, 474-475; 215 NW2d 772 (1974), quoting *Washington v Jones,* 386 Mich 466, 472; 192 NW2d 234 (1971), citing *Montgomery v Stephan*, 359 Mich 33, 36; 101 NW2d 227 (1960). Although loss of consortium includes loss of services and loss of society as components, that does not make the concepts interchangeable or determine whether they are economic or noneconomic in nature.

In distinguishing between a claim for loss of consortium and a claim for loss of society under the WDA, " 'courts have consistently treated loss of consortium not as an item of damages, but as an independent cause of action . . . .' " *Burchett v Rx Optical,* 232 Mich App 174, 179; 591 NW2d 652 (1998), quoting *Eide v Kelsey-*

Hayes Co, 431 Mich 26, 29; 427 NW2d 488 (1988). Loss of consortium constitutes a broader or more encompassing claim focused on allowing recovery for the loss incurred for a family member's own relationship with the injured individual and is specifically precluded under the WDA. This Court recognized the distinctions between an action for loss of consortium and a claim for loss of society and companionship in *Jones v McCullough,* 227 Mich App 543, 546; 576 NW2d 698 (1998), stating, "Such damages are not the same as common-law loss of consortium damages, which is why loss of consortium damages are not treated the same as loss of society and companionship damages allocated in a wrongful death action." *Id.* at 546 (citation omitted). Rather, the dispositive issue is whether loss of services damages constitute an economic or noneconomic loss.

Because an action under the WDA "grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent," *Jenkins, supra* at 165-166, to determine whether loss of services comprises an economic or noneconomic element of damages, we look to MCL 600.1483 to discern the nature and character of the damages available to plaintiff. MCL 600.1483(2) mandates that "[i]n awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss." Our Supreme Court has already determined that WDA cases arising from medical malpractice permit a plaintiff to receive "damages awarded . . . for loss of society and companionship" and that these damages are "clearly noneconomic." *Jenkins, supra* at 168. MCL 600.1483(3) defines "noneconomic loss" as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical dis-

figurement, or other noneconomic loss." However, there is no commensurate provision defining the types of damages encompassed by MCL 600.1483 for economic loss.

Although MCL 600.1483 does not provide a definitive answer regarding whether damages for loss of services are to be characterized as economic or noneconomic, we are guided by other statutory provisions. At the outset, we acknowledge that the Legislature is presumed to be aware of existing law, and we cannot assume that the Legislature inadvertently omitted language from one statute that is present or placed in another. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993). However, even though "the terms of one statute are not dispositive in determining the meaning of another, especially if the statutes were not designed to effectuate a common result, the terms of one statute may be taken as a factor in determining the interpretation of another statute." *Linton v Arenac Co Rd Comm,* 273 Mich App 107, 118; 729 NW2d 883 (2006). See, also, *Wessels v Garden Way, Inc,* 263 Mich App 642, 651; 689 NW2d 526 (2004) ("Just because the Legislature utilized different, and arguably more precise, language in another statute, does not mean that the clear but different language used in these statutes means something substantively different.").

While MCL 600.1483 fails to define what factors comprise an economic loss or fully delineate the components of a noneconomic loss, other sections of the Revised Judicature Act, MCL 600.101 *et seq.*, pertaining to product liability actions resulting from injury or death provide guidance. The Legislature, in MCL 600.2945, specifically defined those terms:

> (c) "Economic loss" means objectively verifiable pecuniary damages arising from medical expenses or medical

> care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses.
>
> * * *
>
> (f) "Noneconomic loss" means any type of pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, or other nonpecuniary damages.

We note that the definition of "economic loss" is consistent with prior versions of the WDA, which focused on pecuniary damages. The definition of "noneconomic loss" under this statutory provision parallels the historical progression of the WDA, which initially precluded recovery for nonpecuniary damages, such as loss of society and companionship, grief, and mental anguish. The definition in MCL 600.2945(f) is also consistent with the definition of "noneconomic loss" in MCL 600.1483(3).

Although the damages recoverable under the WDA are determined by the underlying action, it is nonsensical to construe the nature or character of those damages as being variable depending on the theory of liability. What comprises an economic loss in a medical malpractice action must be the same as what constitutes an economic loss under a different theory of tort liability. To find otherwise would be not only confusing, but also would lead to inconsistent and inequitable results when an injury is fatal.

Finally, in *Lamson v Martin*, 182 Mich App 233; 451 NW2d 601 (1990), this Court addressed the damages instructions provided to the jury for computing

future damages in a wrongful death action. The plaintiff had requested the inclusion of additional language in the instructions for future damages regarding loss of companionship. In determining that the trial court committed error by failing to give the requested instruction, this Court ruled, in relevant part:

> In giving SJI2d 45:02, the standard instruction for damages resulting from wrongful death, the trial court included as elements both the loss of services and the loss of companionship. However, in giving the future damages instruction, SJI2d 53:02, the trial court listed only the former element. Since the absence of the latter element is conspicuous, we doubt that the jury, on their own, would have included it in calculating future damages. Moreover, it is not reasonable to conclude that the jury considered loss of companionship to be covered by the reference to "other benefits" in the instruction. Since this reference was coupled to the term "services," i.e., "services *or* other benefits", we conclude that it is more reasonable that the jury considered the reference to be limited to financial benefits. [*Lamson, supra* at 236-237 (emphasis in original).]

Clearly, this Court has recognized not only the availability of damages for loss of services, but also acknowledged these damages as economic and separate and distinguishable from compensation for loss of society or companionship.

IV. CONCLUSION

We conclude that the statutory language of MCL 600.2922(6) does not preclude plaintiff's claim for damages for loss of services. Further, we reject defendants' assertion that loss of services is merely a component of a claim for loss of society and companionship or the equivalent of a claim for loss of consortium. As a result,

plaintiff's claim for loss of services comprises a claim for economic damages, which is not subject to the damages cap of MCL 600.1483.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

OTTAWA COUNTY v POLICE OFFICERS ASSOCIATION OF MICHIGAN

Docket No. 276669. Submitted December 2, 2008, at Grand Rapids. Decided December 11, 2008, at 9:15 a.m.

The Ottawa Circuit Court, Edward R. Post, J., affirmed an award by a compulsory-arbitration panel convened pursuant to MCL 423.231 *et seq.*, (Act 312) that adopted a proposal by the Police Officers Association of Michigan for retroactive grievance arbitration for Ottawa County sheriff's deputies and detectives. Ottawa County appealed.

The Court of Appeals *held*:

1. The county's claim that Act 312 is unconstitutional is without merit. The Michigan Supreme Court, in *Local 1277, Metro Council No 23, AFSCME, AFL-CIO v Center Line*, 414 Mich 642 (1982), held that Act 312 is clearly constitutional.

2. An Act 312 arbitration panel is not limited in its retroactive awards to awarding increased compensation rates or economic benefits. MCL 423.240 clearly and unambiguously provides that "[i]ncreases in rates of compensation or other benefits may be awarded retroactively." The right to grievance arbitration is a benefit to the detectives and deputies in this case, and the Legislature has provided Act 312 arbitration panels the authority to award noneconomic benefits, like grievance arbitration, retroactively.

3. The Act 312 arbitration panel's finding that the issue of retroactive grievance arbitration was an issue in dispute at collective bargaining and the panel's reasoning for adopting the police officers association's proposal for retroactive grievance administration were both supported by substantial evidence on the record.

Affirmed.

ARBITRATION — ACT 312 ARBITRATION — RETROACTIVE AWARDS OF BENEFITS IN ARBITRATION.

Retroactive awards of benefits by compulsory-arbitration panels convened pursuant to the statute that governs the resolution of labor disputes involving public police and fire departments are not limited to economic benefits; grievance arbitration is a benefit that can be awarded retroactively by such a panel (MCL 423.240).

Nantz, Litowich, Smith, Girard & Hamilton (by *John H. Gretzinger*) for Ottawa County.

Frank A. Guido and *George J. Mertz* for the Police Officers Association of Michigan.

Before: HOEKSTRA, P.J., and BANDSTRA and DONOFRIO, JJ.

PER CURIAM. Petitioner, Ottawa County (the County), appeals as of right the circuit court's order affirming the award of the Act 312 arbitration panel. Because we conclude that Act 312, MCL 423.231 *et seq.*, is constitutional, an Act 312 arbitration panel may award noneconomic benefits retroactively, and the arbitration panel's finding that retroactive grievance arbitration was an issue in dispute during the collective bargaining sessions was supported by sufficient evidence, as was its reasoning to adopt the proposal by respondent, Police Officers Association of Michigan (POAM), of retroactive grievance arbitration, we affirm.

The instant appeal involves the County's attempts to negotiate with POAM, which represents the County's sheriff's detectives and road patrol deputies, a successor agreement to the parties' collective bargaining agreement that expired on December 31, 2002. The County specifically objects to the Act 312 arbitration panel's adoption of POAM's proposal regarding retroactive grievance arbitration, which provided that "[t]he right to arbitrate grievances shall be retroactive to January 1, 2003[,] for any pending grievances, including those filed on or after January 1, 2003."

I

The orders of an Act 312 arbitration panel are subject to judicial review in the circuit court, "but only for

reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means." MCL 423.242; *Detroit v Detroit Fire Fighters Ass'n, Local 344, IAFF*, 204 Mich App 541, 550; 517 NW2d 240 (1994). Substantial evidence is defined as "any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Becker-Witt v Bd of Examiners of Social Workers*, 256 Mich App 359, 361; 663 NW2d 514 (2003) (quotation marks and citations omitted). This Court also reviews an order of an Act 312 arbitration panel under the standards set forth in MCL 423.242. *Detroit v Detroit Police Officers Ass'n*, 408 Mich 410, 480-483; 294 NW2d 68 (1980) (opinion by WILLIAMS, J.); *Detroit Fire Fighters Ass'n, supra* at 550-551, 551 n 10. In addition, this Court "may review an error of law that is substantial and apparent on its face." *Police Officers Ass'n of Michigan v Ottawa Co Sheriff (On Reconsideration)*, 264 Mich App 133, 136; 694 NW2d 757 (2004). Questions concerning the constitutionality and interpretation of a statute are reviewed de novo. *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10-11; 743 NW2d 902 (2008).

II

The County claims that Act 312 is unconstitutional. However, because our Supreme Court has stated that "Act 312 is clearly constitutional," *Local 1277, Metro Council No 23, AFSCME, AFL-CIO v Center Line*, 414 Mich 642, 648; 327 NW2d 822 (1982), the County's argument is without merit.

III

The County also contends that Act 312 does not permit an arbitration panel to award noneconomic benefits, such as the right to grievance arbitration, retroactively. The County claims that the phrase "[i]ncreases in rates of compensation or other benefits" in MCL 423.240 refers only to economic benefits. We disagree.

This Court previously held that an Act 312 arbitration panel could not award noneconomic benefits retroactively. *Local 1917, Metro Council No 23, AFSCME v Wayne Co Bd of Comm'rs*, 86 Mich App 453, 462-463; 272 NW2d 681 (1978). However, the Court in *Local 1917, Metro Council* addressed the 1969 version of MCL 423.240, which provided, in pertinent part:

> Increases in rates of compensation awarded by the arbitration panel under section 10 may be effective only at the start of the fiscal year next commencing after the date of the arbitration award. If a new fiscal year has commenced since the initiation of arbitration procedures under this act, the foregoing limitation shall be inapplicable, and such awarded increases may be retroactive to the commencement of such fiscal year any other statute or charter provisions to the contrary notwithstanding.

Regarding the 1969 version of MCL 423.240, the Court stated:

> The Legislature specifically speaks of retroactivity but only in regards to economic benefits. The Legislature was conspicuously silent on retroactivity of noneconomic benefits. We hold that had the Legislature intended for arbitration panels acting under the 1969 Act to have the power to grant retroactivity to the subject noneconomic provisions, [it] would have so provided. The Court is constrained to hold that the intent of the Michigan Legislature was not to grant such retroactivity. [*Local 1917, Metro Council, supra* at 463.]

However, the Legislature amended MCL 423.240, effective January 3, 1978. The statute now provides, in relevant part:

> *Increases in rates of compensation or other benefits* may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding. [Emphasis added.]

Because the Court in *Local 1917, Metro Council* addressed a different version of MCL 423.240 than is applicable to the present case, the Court's holding in *Metro Council* is not determinative of the issue whether an Act 312 arbitration panel may award noneconomic benefits retroactively.[1]

Rather, to determine whether an Act 312 arbitration panel may award noneconomic benefits retroactively, we must interpret the current version of MCL 423.240. This Court's primary goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. *Karpinski v St John Hosp-Macomb Ctr Corp*, 238 Mich App 539, 542-543; 606 NW2d 45 (1999). The first criterion in determining the Legislature's intent is the specific language of the statute. *Walters v Leech*, 279 Mich App 707, 709; 761 NW2d 143 (2008). If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and the statute must be enforced as written. *Id.* "[A] court may read

[1] We reject the County's argument that, because the Court decided *Local 1917, Metro Council* ten months after the amendment of MCL 423.240 took effect, the Court must have known that the statute had been amended to include the phrase "other benefits," which explains why the Court spoke of economic and noneconomic benefits when the 1969 version of the statute did not contain the word "benefits." The County's claim regarding why the Court in *Local 1917, Metro Council* used certain language in its analysis is pure speculation. The Court interpreted the 1969 version of MCL 423.240, and nothing in its analysis suggests that its interpretation was influenced by the amended version of the statute.

nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). It is appropriate to consult a dictionary for terms that are not defined in the statute. *Robinson v Ford Motor Co*, 277 Mich App 146, 152; 744 NW2d 363 (2007).

Before the Legislature amended MCL 423.240, an Act 312 arbitration panel was only authorized to award "[i]ncreases in rates of compensation" retroactively. Following the amendment of MCL 423.240, an arbitration panel may award "[i]ncreases in rates of compensation or other benefits" retroactively. "[C]hanges in statutory language are generally presumed to reflect a change in meaning." *Karpinski, supra* at 545. However, such changes can also demonstrate an attempt to clarify the meaning of a provision rather than change it. *Ewing v Detroit*, 237 Mich App 696, 703; 604 NW2d 787 (1999).

Construing MCL 423.240 "liberally," as Act 312 mandates in MCL 423.231, we conclude that the Legislature, when amending MCL 423.240, intended to change the scope of the employment benefits that an Act 312 arbitration panel may award retroactively. "The word 'or' generally refers to a choice or alternative between two or more things." *Auto-Owners Ins Co v Stenberg Bros, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997). In addition, the word "other" is defined as "additional or further"; "different from the one mentioned"; and "different in nature or kind." *Random House Webster's College Dictionary* (1992). The word "benefit" is defined, in relevant part, as "something that is advantageous or good; an advantage." *Id.* By inserting the phrase "or other benefits" into MCL 423.240, the Legislature expanded the authority of Act 312 arbitration panels to allow them to retroactively award additional

benefits that are "different in nature and kind" from increased compensation rates. Accordingly, pursuant to the clear and unambiguous language of MCL 423.240, an Act 312 arbitration panel is not limited to awarding increased compensation rates, or even just economic benefits, retroactively. The statute, in referring to "other benefits," makes no distinction between economic and noneconomic benefits. To limit the phrase "[i]ncreases in rates of compensation or other benefits" to include only economic benefits, as urged by the County, would be to read into the statute a limitation that is not contained in the statute's unambiguous language. We are prohibited from reading such a limitation into the statute. *Roberts, supra*.[2] Thus, because the Legislature has authorized an Act 312 arbitration panel to award "other benefits" retroactively, an arbitration panel may award noneconomic benefits retroactively.

The right to arbitrate grievances is clearly a benefit to the detectives and deputies represented by POAM. Grievance arbitration is "something that is advantageous or good" to them. It provides them an efficient and cost-effective method, presided over by those knowledgeable in the law and subject matter, to resolve their disputes with the County. Indeed, the County does not dispute that the right to grievance arbitration is a benefit to its detectives and deputies. Therefore, because the right to grievance arbitration is a benefit and the Legislature has provided Act 312 arbitration panels the authority to award noneconomic benefits retroactively, the arbitration panel was not without authority to award POAM the right to grievance arbitration retroactively.

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[2] Further, because the language of MCL 423.240 is unambiguous, we are required to decline the County's request to examine the legislative history of the statute's amendment. See *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007).

IV

Finally, the County argues that, even if the arbitration panel had the authority to award the right to grievance arbitration retroactively, the arbitration panel's award of retroactive grievance arbitration was not supported by substantial evidence on the record. First, the County claims that the arbitration panel's finding that the issue of retroactive grievance arbitration was an issue in dispute during the collective bargaining negotiations was not supported by substantial evidence. Second, the County claims that the arbitration panel's reasoning for adopting POAM's retroactive grievance arbitration proposal is not supported by substantial evidence. We disagree with both of the County's assertions.

The arbitration panel's finding that retroactive grievance arbitration was an issue in dispute during the collective bargaining negotiations is supported by substantial evidence on the record. James DeVries, POAM's business agent, testified that he made it "very clear" and "articulate[d]" to the County that the phrase "wages and benefits" contained in POAM's proposal to continue the parties' collective bargaining agreement for one year was "inclusive of the retroactivity for any grievances that occurred after the expiration of the contract." DeVries further testified that POAM's two final proposals regarding duration of the contract and retroactive grievance arbitration encompassed the discussions that he had with Richard Schurkamp, the County's chief negotiator, and that the County had rejected POAM's duration proposal. DeVries's testimony, along with the fact that the parties were engaged in a separate lawsuit involving the issue of retroactive grievance arbitration,[3] is evidence that reasonable

[3] The other litigation involving the parties and the issue of retroactive grievance arbitration was also brought before this Court. See *Police Officers Ass'n of Michigan, supra*.

minds would accept as adequate to support the arbitration panel's finding that retroactive grievance arbitration was an issue in dispute during the collective bargaining negotiations. *Becker-Witt, supra*.

In addition, the arbitration panel's reasoning for adopting the retroactive grievance arbitration proposal is supported by sufficient evidence on the record. In adopting the proposal, the arbitration panel concluded:

> [I]t is noted that it seems apparent that the interests and welfare of the public would be better served by utilizing arbitration as a last step of the grievance procedure rather than parties resorting to litigation. Generally, although not always, arbitration is faster, less expensive and conducted by individuals who are especially knowledgeable in employment management affairs. Additionally, morale in the unit could possibly suffer and thus affect the public if members of the unit were treated as "at will" employees or forced to sue in order to realize rights preserved by statute.

This statement by the arbitration panel comports with Michigan's public policy favoring arbitration. See MCL 423.231; *Jozwiak v Northern Michigan Hosps, Inc*, 207 Mich App 161, 165; 524 NW2d 250 (1994).

Further, the arbitration panel's finding that other employers have not taken the County's position, which essentially refuses postagreement grievance arbitration, is supported by the testimony of DeVries. DeVries testified that POAM represents approximately 400 bargaining units throughout the state and that he represents approximately 60 of those units. He testified that none of the employers of those 60 units, other than the County, refuses to proceed to grievance arbitration. While the County asserts that DeVries "had no personal knowledge of the position of other comparable counties on this issue" and that it introduced the contracts from "three comparable counties to examine their contrac-

tual provision," we "may not reassess the wisdom of the arbitration panel or engage in a review de novo." *Detroit Fire Fighters Ass'n, supra* at 551. The arbitration panel's decision to adopt POAM's proposal regarding retroactive grievance arbitration is supported by evidence that reasonable minds would accept as adequate to support the decision. *Becker-Witt, supra*.

Affirmed.

RDM HOLDINGS, LTD v CONTINENTAL PLASTICS CO

Docket No. 278912. Submitted December 9, 2008, at Detroit. Decided December 16, 2008, at 9:00 a.m.

RDM Holdings, Ltd., in an earlier action brought in the Macomb Circuit Court against Continental Lighting, L.L.C. (Con-Lighting), alleged breach of a lease for commercial property and obtained an order granting partial summary disposition in its favor. Con-Lighting then filed for chapter 7 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, and an order staying further proceedings in the Macomb Circuit Court action (RDM) was entered. RDM and Chestnut Properties, L.L.C., then filed the instant lawsuit (RDM II) in the Macomb Circuit Court against Continental Plastics Co. (Con-Plastics) and Continental Coatings, L.L.C. (Con-Coatings), alleging successor liability, violation of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*., and a claim seeking to pierce the corporate veil. The theories of recovery in RDM II reflected efforts to hold the defendants liable for Con-Lighting's breaches of the lease involved in RDM I and for breaches of leases, under which Chestnut was the landlord, with respect to two additional commercial properties rented to Con-Lighting. The bankruptcy proceedings resulted in a determination that Con-Lighting had a zero asset estate, ultimately leading to the filing of a "no distribution report" and the closing of the bankruptcy estate. The circuit court, Mary A. Chrzanowski, J., granted summary disposition in RDM II in favor of the defendants on the basis of res judicata, ruling that the allegations raised in the RDM II complaint could have been addressed in the bankruptcy proceedings had the plaintiffs pursued the matter. The plaintiffs appealed the circuit court's order and the denial of their motion for partial summary disposition of the UFTA claim. The defendants cross-appealed, contending that the trial court properly applied the doctrine of res judicata arising out of the bankruptcy proceedings or, if not, res judicata properly could have been grounded on the RDM I lawsuit. The defendants further maintained that they were entitled to summary disposition with regard to the successor liability, UFTA, and corporate veil claims.

The Court of Appeals *held*:

1. Federal law governs the analysis of whether res judicata preclusion may result from bankruptcy proceedings.

2. Under federal law, res judicata precludes a subsequent lawsuit if four elements are present. First, there must have been a final decision on the merits by a court of competent jurisdiction. Second, there must be a subsequent action between the same parties or their privies. Third, there must be an issue in the subsequent action that was litigated or that should have been litigated in the prior action. Fourth, there must be an identity of the causes of action.

3. The general principle is that res judicata can be invoked in a lawsuit on the basis of an earlier bankruptcy proceeding.

4. The bankruptcy court, a court of competent jurisdiction in this case, did render a judgment on the merits for purposes of res judicata.

5. The RDM II lawsuit was between the same parties or their privies as those involved in the bankruptcy proceedings because RDM, Chestnut, Con-Plastics, and Con-Coatings were all listed as creditors in the bankruptcy proceedings and creditors in bankruptcy proceedings must be considered parties for purposes of res judicata.

6. A bankruptcy trustee has the authority to pursue fraudulent conveyance actions. A creditor who believes that a lawsuit should be commenced has the right to petition the bankruptcy court in an effort to compel the trustee to take action or to seek permission to prosecute the lawsuit. There is no merit in the plaintiffs' argument that they could not force the trustee to act. It cannot be said that the fraudulent conveyance claim could not have been litigated in the bankruptcy court. The third element of res judicata was satisfied with regard to the fraudulent conveyance claim.

7. There is no evidence to support a conclusion that Con-Coatings is liable to the plaintiffs under a corporate veil theory.

8. The debtor (Con-Lighting) and the trustee could not have asserted a claim to pierce Con-Lighting's own corporate veil in the bankruptcy proceedings. It cannot be concluded for purposes of res judicata that, with regard to Con-Plastics, the plaintiffs could or should have litigated the corporate veil claim in the bankruptcy proceedings. The trial court erred in dismissing this claim on the basis of res judicata arising out of the bankruptcy proceedings.

9. Con-Plastics was not Con-Lighting's corporate successor and did not carry on the business operations of Con-Lighting after

Con-Lighting ceased operations. Con-Plastics is entitled to summary disposition on the successor liability claim under MCR 2.116(C)(10).

10. It cannot be concluded that the plaintiffs could have pursued a successor liability claim in the bankruptcy court.

11. Successor liability and alter ego claims are not core proceedings that could only have been addressed in the bankruptcy court.

12. It is incorrect to conclude that because the fraudulent conveyance claim was not raised in the bankruptcy proceeding, no identity of claims exists. Identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action. Had the plaintiffs raised the fraudulent conveyance claim in the bankruptcy proceedings, as they should have done, the claim would have arisen out of the same transaction or core operative facts giving rise to the claim contained in RDM II. Therefore, the fourth element of res judicata was satisfied. The defendants were entitled to summary disposition with respect to the fraudulent conveyance claim.

13. The defendants' argument that the plaintiffs' claims are barred by res judicata grounded on the RDM I lawsuit was actually an argument regarding necessary joinder under MCR 2.205, which was not implicated under the facts presented.

14. There are genuine issues of material fact with respect to the successor liability claim against Con-Coatings and in regard to the corporate veil claim against Con-Plastics. Summary disposition was not proper with regard to those claims, and the case must be remanded for further proceedings regarding those claims.

Affirmed in part, reversed in part, and remanded for further proceedings.

1. JUDGMENTS — RES JUDICATA — FEDERAL LAW.

Res judicata under federal law precludes a subsequent lawsuit where four elements are present: first, there must be a final decision on the merits by a court of competent jurisdiction, second, the subsequent action must be between the same parties or their privies, third, there is an issue in the subsequent action that was or should have been litigated in the prior action, and fourth, there must be an identity of the causes of action.

2. JUDGMENTS — RES JUDICATA — BANKRUPTCY.

An application of the doctrine of res judicata may be grounded on earlier bankruptcy proceedings.

3. JUDGMENTS — RES JUDICATA — FINAL JUDGMENTS — BANKRUPTCY.

A bankruptcy order that entirely resolves all the issues pertaining to a claim will satisfy the res judicata requirement of a final judgment.

4. BANKRUPTCY — PARTIES — CREDITORS — RES JUDICATA.

Creditors in bankruptcy proceedings must be considered parties for purposes of res judicata.

5. JUDGMENTS — RES JUDICATA — BANKRUPTCY — FEDERAL LAW.

If a party had a full and fair opportunity to litigate a claim in the bankruptcy court but chose not to do so, federal res judicata law bars litigating that claim in a state court.

6. JUDGMENTS — RES JUDICATA — IDENTITY OF CAUSES OF ACTION FOR RES JUDICATA.

The element of federal res judicata law requiring identity of the prior and subsequent causes of action is satisfied if the claims arose out of the same transaction or series of transactions, or where the claims arose out of the same core operative facts; courts must compare the substance of the actions, not their form, in determining whether the causes of action are the same; identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action.

Clark Hill PLC (by *William G. Asimakis, Jr.*, and *Paul C. Smith*) for the plaintiffs.

Bellanca, Beattie & DeLisle, P.C. (by *James C. Zeman*), for the defendants.

Before: MURPHY, P.J., and SAWYER and WHITBECK, JJ.

MURPHY, P.J. Plaintiffs appeal as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) on the basis of res judicata grounded on earlier bankruptcy proceedings conducted under title 11 of the United States Code, the Bankruptcy Code, and more specifically chapter 7, 11 USC 701 *et seq*. (liquidation). Defendants cross-appeal, arguing alternative grounds, which were raised but not decided below, in support of the trial court's

ruling to summarily dismiss plaintiffs' action.[1] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. OVERVIEW

In an earlier lawsuit filed by plaintiff RDM Holdings, Ltd. (RDM), against Continental Lighting, L.L.C. (Con-Lighting), formerly known as Continental-Chivas, L.L.C. (Con-Chivas), neither of which is a party here, RDM obtained an order granting partial summary disposition in its favor, but Con-Lighting then filed for chapter 7 bankruptcy protection, staying further proceedings. That lawsuit, which we shall refer to as the RDM I litigation, concerned commercial property located on Merrill Road in Sterling Heights that was leased to Con-Lighting and used to manufacture automobile parts for General Motors Corporation (GM) and DaimlerChrysler Corporation. RDM alleged breach of the lease with respect to Con-Lighting's obligations to pay holdover rent, insurance, and damages for building repairs and cleanup.[2]

Following the bankruptcy stay that halted the RDM I litigation, RDM and Chestnut Properties, L.L.C. (Chestnut), filed the instant suit against defendants Continental Plastics Co. (Con-Plastics) and Continental Coatings, L.L.C. (Con-Coatings), alleging successor liability, violation of the Uniform Fraudulent Transfer

[1] It was unnecessary for defendants to file a cross-appeal to present alternative arguments in support of the trial court's ruling. See *In re Herbach Estate*, 230 Mich App 276, 284; 583 NW2d 541 (1998) ("Although a cross appeal is necessary to obtain a decision more favorable than that rendered by the lower tribunal, a cross appeal is not necessary to urge an alternative ground for affirmance, even if the alternative ground was considered and rejected by the lower court.").

[2] The order granting partial summary disposition in RDM I provided that Con-Lighting was "a holdover tenant and obligated under the lease agreement for a term of an additional year."

Act (UFTA), MCL 566.31 *et seq.*, and a claim seeking to pierce the corporate veil. We shall refer to the present lawsuit as the RDM II litigation. In RDM II, the theories of recovery reflected efforts to hold defendants liable for Con-Lighting's alleged breaches of the Merrill Road lease, which were also the subject matter of the RDM I lawsuit. Plaintiffs further alleged in RDM II that Con-Lighting breached leases, under which Chestnut was the landlord, with respect to two additional business properties rented to Con-Lighting.

The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(7) on the basis of res judicata, ruling that the allegations raised in the RDM II complaint could have been addressed in the bankruptcy proceedings had plaintiffs pursued the matter. Plaintiffs appeal that determination, arguing that the elements of res judicata had not been satisfied, and they appeal the trial court's denial of their motion for partial summary disposition on the UFTA claim. Defendants argue that the trial court properly applied the doctrine of res judicata arising out of the bankruptcy proceedings and that plaintiffs were not entitled to summary disposition on the UFTA claim. Moreover, defendants cross-appeal, contending that, even if the trial court erred in applying res judicata in the context of the court's reliance on the earlier bankruptcy proceedings, res judicata grounded on the RDM I lawsuit would apply. Further, defendants maintain that they were entitled to summary disposition under MCR 2.116(C)(10) with regard to the successor liability, UFTA, and corporate veil claims.

II. REVIEW OF THE CHAPTER 7 BANKRUPTCY PROCEEDINGS

On August 19, 2005, 11 days after the order granting partial summary disposition was entered in RDM I,

Con-Lighting filed a voluntary petition for bankruptcy under chapter 7 in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division. The petition referred to past names used by Con-Lighting, i.e., Chivas Products, Ltd., and Con-Chivas, it was signed by Kenneth Lamb as president of Con-Lighting,[3] and the petition estimated that there existed between 50 to 99 creditors. A summary of bankruptcy schedules, and the schedules themselves, indicated that Con-Lighting had zero assets, while its liabilities amounted to approximately $2.4 million. A statement of financial affairs provided that Con-Lighting had annual gross income from sales in the amounts of $15.7 million in 2002, $12.7 million in 2003, and $9.5 million in 2004. Additionally, the statement of financial affairs indicated that $940,233 in property and assets had been surrendered to Comerica Bank.[4] In an October 19, 2005, § 341

[3] We note that at the time of the bankruptcy filing, Lamb was a manager for Con-Coatings and had been in that position since October 18, 2004.

[4] In actuality, Con-Lighting property and assets had been surrendered to Con-Plastics pursuant to an agreement executed on February 15, 2005, and that surrender agreement indicated that the value of the property and assets was $1.3 million. Before February 15, 2005, Con-Lighting had been obligated to repay certain Comerica Bank loans, which had been issued over the years and secured by Con-Lighting property, and there was a total outstanding balance of approximately $4.6 million. By agreement also dated February 15, 2005, Comerica assigned to Con-Plastics all of the bank's rights under the promissory notes and security instruments that had been executed by Con-Lighting. In exchange, Con-Plastics executed a note in favor of Comerica in the amount of $4.6 million, representing the debt that had been owed by Con-Lighting to the bank. Con-Plastics thereby became itself indebted to Comerica, taking Con-Lighting out of the picture. There was documentary evidence indicating that Con-Lighting property had made its way to Con-Coatings months before the surrender agreement was executed, that some of Con-Lighting's employees began working for Con-Coatings in October 2004, and that Con-Lighting's operations ceased in October 2004, with operations and production shifting to Con-Coatings.

hearing,[5] with bankruptcy trustee Mark Shapiro presiding, Lamb testified that there was a mistake in the petition and that the Con-Lighting property and assets had actually been surrendered to Con-Plastics. Lamb was unaware of any appraisals being done in regard to the Con-Lighting property before its surrender.

The bankruptcy petition stated that Gregory Eaton held a 51 percent interest in Con-Lighting and that the remaining 49 percent interest was held entirely by Con-Plastics. The petition provided that Con-Plastics currently had possession of Con-Lighting's books of account and records, along with records of a Con-Lighting inventory. Bankruptcy schedule F (creditors holding unsecured nonpriority claims) listed, among many other creditors, plaintiff Chestnut, with a claim amount of $1,600, and RDM, with the claim amount expressed as "unknown." Also listed as creditors holding unsecured nonpriority claims were Con-Coatings, owed $1.5 million, and Con-Plastics, owed $303,286.

Bankruptcy trustee Shapiro testified in his deposition that his job in conducting a chapter 7 bankruptcy was to ascertain whether any assets were available for distribution and to liquidate available assets for the benefit of the creditors. He stated that the Con-Lighting bankruptcy was a zero asset estate, which ultimately led to the filing of a "no distribution report" and the closing of the bankruptcy estate. Shapiro testified that claims of successor liability, piercing the corporate veil, alter ego, and fraudulent conveyances were all claims that could be brought or raised by a trustee in the context of a bankruptcy proceeding, usually taking the form of an adversarial proceeding. He asserted that he had done so in the past in other cases. According to

[5] This is a reference to 11 USC 341, which concerns the meeting of creditors.

Shapiro, he could have pursued those claims against Con-Plastics and Con-Coatings in the bankruptcy court on his own initiative or if requested and justified; plaintiffs, however, never made such a request. Had those claims been successfully pursued in the bankruptcy proceedings, Shapiro could have taken monies recovered from Con-Plastics and Con-Coatings and distributed the funds to creditors, including plaintiffs. He indicated that he has a fiduciary duty to all creditors to look into the validity of such claims. All creditors would have received notice of the bankruptcy. Shapiro was not aware of any laws that obligated or mandated a creditor in bankruptcy proceedings to come forward with claims such as those alleged in RDM II.

We recognize that, while providing some helpful insight, Shapiro's testimony concerning the authority of a trustee and the bankruptcy court relative to successor liability, corporate veil, and fraudulent conveyance claims and issues does not control. Such matters are governed by the Bankruptcy Code and relevant caselaw construing the code.

III. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The issue whether the doctrine of res judicata bars a subsequent lawsuit constitutes a question of law that this Court likewise reviews de novo on appeal. *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001).

IV. SUMMARY DISPOSITION TESTS

We shall first address the issue of res judicata and whether application of the doctrine could be grounded

on the bankruptcy proceedings under the circumstances presented. Under MCR 2.116(C)(7) (claim barred by prior judgment, i.e., res judicata), this Court must consider not only the pleadings, but also any affidavits, depositions, admissions, or other documentary evidence filed or submitted by the parties. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). This Court must consider the documentary evidence in a light most favorable to the nonmoving party. *Herman v Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide. *Huron Tool & Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 377; 532 NW2d 541 (1995). If a factual dispute exists, however, summary disposition is not appropriate. *Id.*

Because we conclude that the trial court erred in part in applying res judicata, we shall also consider defendants' arguments under MCR 2.116(C)(10). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*

v Gen Motors Corp, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

V. ANALYSIS : RES JUDICATA AND BANKRUPTCY PROCEEDINGS

A. GOVERNING PRINCIPLES

Our starting point is to determine the applicable res judicata test. Chronologically, we are confronted with a situation in which a federal proceeding was initiated before the complaint in RDM II was filed and the bankruptcy case was closed before the hearing on the motion for summary disposition. In *Beyer v Verizon North, Inc*, 270 Mich App 424, 428-429; 715 NW2d 328 (2006), this Court stated:

> This Court must apply federal law in determining whether the doctrine of res judicata requires dismissal of this case because the consent judgment in the prior suit was entered by a federal court. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380-381; 596 NW2d 153 (1999). Under federal law, res judicata precludes a subsequent lawsuit if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action. *Becherer v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 193 F3d 415, 422 (CA 6, 1999), quoting *Bittinger v Tecumseh Products Co*, 123 F3d 877, 880 (CA 6, 1997) (emphasis omitted in *Becherer*). [Some quotation marks omitted.][6]

[6] We note that the United States Supreme Court has stated that, pursuant to the doctrine of res judicata, a final judgment on the merits precludes the parties or their privies from relitigating matters that were

In *Pierson Sand, supra* at 380-381, our Supreme Court, quoting 18 Moore, Federal Practice, § 131.21(3)(d), p 131-50, stated:

> "If a plaintiff has litigated a claim in federal court, the federal judgment precludes relitigation of the same claim in state court based on issues that were or could have been raised in the federal action, including any theories of liability based on state law. The state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment."

Accordingly, federal law guides our res judicata analysis, and we will look to any relevant opinions issued by the United States Court of Appeals for the Sixth Circuit, absent pertinent United States Supreme Court precedent, on matters concerning creditors' rights and the extent of the authority exercisable by the bankruptcy court and the trustee in the context of this case. See *In re Livingston*, 379 BR 711, 725 (WD Mich, 2007) ("It is . . . understood that district courts and bankruptcy courts within this circuit are bound by published Sixth Circuit decisions.");[7] *In re Dow Corning Corp*, 244 BR 634, 651 (ED Mich, 1999) (subsequent history omitted) (Michigan bankruptcy court is bound by Sixth Circuit ruling on an issue). Opinions issued by the United States District Court for the Eastern District of Michigan, as well as those issued by the United States Bankruptcy Court for the Eastern District of Michigan, would also be relevant on issues concerning

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or could have been raised in the first action. *San Remo Hotel, LP v City & Co of San Francisco, California*, 545 US 323, 336 n 16; 125 S Ct 2491; 162 L Ed 2d 315 (2005).

[7] The bankruptcy judge in *Livingston, supra* at 726, further stated that "the policies of both the Supreme Court and the Sixth Circuit require that I accept their interpretations of the Bankruptcy Code regardless of whether my own interpretation may be different."

exercisable authority and creditors' rights. And of course, the Bankruptcy Code is the bedrock of any review.

While Michigan bankruptcy courts are bound by reported Sixth Circuit rulings construing the Bankruptcy Code, thereby making it appropriate for us to examine the rights, duties, and authority of those involved in bankruptcy proceedings under Sixth Circuit precedent, this consideration naturally extends only to the res judicata question whether the issues in RDM II could or should have been litigated in the bankruptcy court. For example, if the United States Court of Appeals for the Fifth Circuit differed from the Sixth Circuit on an issue regarding whether the Bankruptcy Code granted a chapter 7 trustee authority to initiate an adversarial proceeding on an alter ego theory, it would make little sense for us to follow Fifth Circuit precedent in determining whether trustee Shapiro could or should have pursued an alter ego theory in a bankruptcy court located within the Sixth Circuit's jurisdiction. But, and again appreciating that we must apply federal law, this does not mean that we are required to apply federal law as interpreted by the Sixth Circuit on other res judicata issues, such as whether the bankruptcy court issued a final decision on the merits, whether the same parties or privies are involved, whether there is an identity of the causes of action, or whether other res judicata principles are implicated. These issues are, for the most part, inextricably linked to interpretation of the United States Bankruptcy Code. Under *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004), our Supreme Court ruled that state courts are bound by decisions issued by the United States Supreme Court that construe federal law. But "there is no similar obligation with respect to decisions of the lower federal courts." *Id.* If there are conflicting

decisions rendered by lower federal courts, we are free to choose the view that seems most appropriate to us. *Id.* And even if no such conflict exists, we are not bound "to follow the decisions of even a single lower federal court." *Id.* at 607. Lower federal court rulings may be persuasive, but they are not binding on a state court. *Id.*[8] Furthermore, in *Pierson Sand,* the federal court action, which predated the state court action, originated in the United States District Court for the Western District of Michigan, eventually winding up before the Sixth Circuit for decision. *Pierson Sand, supra* at 375-377. The *Pierson Sand* Court, in conducting its res judicata analysis, relied not only on Sixth Circuit precedent, but also cited Second, Third, Fifth, and Ninth circuit opinions. *Id.* at 384, 386.

We also make the observation that both the Michigan Supreme Court and the United States Supreme Court have held that application of the doctrine of res judicata can be grounded on earlier bankruptcy proceedings. In *Gursten v Kenney*, 375 Mich 330, 335; 134 NW2d 764 (1965), our Supreme Court stated that res judicata applies to every issue that belonged within the subject matter of the bankruptcy action, including those that the parties, exercising reasonable diligence, could have brought forward at the time. The Court concluded:

> While plaintiff may have had an election of remedies for the alleged tortious conduct of the defendants, he elected to pursue the matter before the referee in bankruptcy. Having made that choice, he was under obligation to pursue it or abide by an adverse result because of his failure to do so. [*Id.*]

In *DePolo v Greig*, 338 Mich 703; 62 NW2d 441 (1954), our Supreme Court applied res judicata to bar a

[8] *Abela* concerned the proper interpretation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 USC 2301 *et seq*. *Abela*, *supra* at 605-606.

circuit court action in which the plaintiffs sued the president of a corporation for selling them unvalidated stock, where the plaintiffs already had the full opportunity to present the same issues in the corporation's bankruptcy proceedings. The Court stated, "Defendant as president and principal stockholder of the corporation was a stranger to the bankruptcy proceedings in only the strictest sense of the term[, and] [p]laintiffs had full opportunity to present the same issues now presented against the defendant." *Id.* at 711-712.

In *Katchen v Landy*, 382 US 323, 334; 86 S Ct 467; 15 L Ed 2d 391 (1966), the United States Supreme Court expressed the following:

> [O]nce a bankruptcy court has dealt with the preference issue nothing remains for adjudication in a plenary suit. The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts. More specifically, a creditor who offers a proof of claim and demands its allowance is bound by what is judicially determined, and if his claim is rejected, its validity may not be relitigated in another proceeding on the claim. [Citations omitted.]

Accordingly, as a general principle, res judicata can be invoked in a lawsuit on the basis of an earlier bankruptcy proceeding. And with respect to chapter 7 in particular, the United States Court of Appeals for the Second Circuit in *EDP Med Computer Sys, Inc v United States*, 480 F3d 621, 624-625 (CA 2, 2007), observed:

> *Res judicata* "is a rule of fundamental repose important for both the litigants and for society." It "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." These virtues have no less value in the bankruptcy context; this is particularly true in a Chapter 7 liquidation where it is desirable that matters be resolved as expeditiously and

> economically as possible. . . . "[I]t is more imperative than ever that the doctrine of *res judicata* be applied with unceasing vigilance" to Chapter 7 proceedings[.] [Citations omitted; first three alterations in original.]

B. ELEMENT 1: FINAL DECISION ON THE MERITS BY A COURT OF COMPETENT JURISDICTION

We now examine the first element of federal res judicata, which requires a final decision on the merits by a court of competent jurisdiction. Plaintiffs argue that the bankruptcy court did not render a judgment on the merits for purposes of res judicata. We disagree. In a chapter 7 bankruptcy, the trustee marshals the assets of the debtor, liquidates the estate, and distributes the proceeds, if any, to the creditors. 11 USC 721 *et seq*. (subchapter II of chapter 7—collection, liquidation, and distribution of the estate); *In re Conference of African Union First Colored Methodist Protestant Church*, 184 BR 207, 218 (D Del, 1995). The Federal Rules of Bankruptcy Procedure (FRBP) address the closing of a chapter 7 liquidation case, providing:

> If in a chapter 7 . . . case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered. [FRBP 5009.]

Here, there is no dispute that trustee Shapiro filed the necessary documents, that he certified that the estate was fully administered, and that there were no objections. "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 USC 350(a). The Con-Lighting chapter 7 case was closed by order of the bankruptcy court.

With respect to determining the finality of a bankruptcy order, each matter that arises between the filing of a bankruptcy petition and the issuance of a closing order is treated as a separate proceeding, and a final order can be any order that concludes a discrete judicial unit in the larger case. *In re Moody*, 817 F2d 365, 367-368 (CA 5, 1987). A bankruptcy order that entirely resolves all the issues pertaining to a claim will satisfy the res judicata requirement of a final judgment. *In re Iannochino*, 242 F3d 36, 43-44 (CA 1, 2001). For purposes of res judicata grounded on bankruptcy proceedings, "[c]losing orders are, of course, final judgments on the merits." *In re Coastal Plains, Inc*, 338 BR 703, 713 n 5 (ND Tex, 2006). Here, the case was closed after the trustee earlier issued a "no distribution report" on determination that the bankruptcy estate had zero assets. There were no further matters to resolve.[9] Thus, we conclude that there was a final decision on the merits by a court of competent jurisdiction, thereby satisfying the first element of res judicata.[10]

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[9] Any suggestion by plaintiffs that there was no final decision on the merits because the bankruptcy court never determined whether there were fraudulent conveyances or other wrongful acts lacks logic. The bankruptcy court never entertained these issues because they were never brought to its attention, and such a suggestion would effectively eliminate res judicata being applied in the context of an argument that a claim could have been presented but was not.

[10] Plaintiffs place great reliance on *Hatchett v United States*, 330 F3d 875 (CA 6, 2003), for the proposition that there was no final decision on the merits. *Hatchett* concerned an action by the plaintiffs, husband and wife, against the government for a wrongful levy on entireties property, where it was only the plaintiff husband who owed more than $8 million in taxes. The central theme of the government's defense and argument was that levies may attach to entireties property. A secondary argument was that the husband fraudulently conveyed the property to himself and his wife while insolvent; the argument was referred to as the fraudulent conveyance defense. The conveyance issue was the subject of previous and finalized bankruptcy proceedings. The lower court refused to allow presentation of

We acknowledge that when a chapter 7 proceeding concludes with regard to a corporate entity, there is no discharge of debts. 11 USC 727(a)(1) ("The court shall grant the debtor a discharge, unless . . . the debtor is not an individual[.]"); *In re Strada Design Assoc, Inc*, 326 BR 229, 240 (SD NY, 2005) (debtor corporations not entitled to discharge or a fresh start). However, this does not negate the fact that the bankruptcy court closed the case, nor does it run contrary to our conclusion that there was a final decision on the merits. Con-Lighting's debts were not and could not be discharged and there remained potential liability on the debts by Con-Plastics and Con-Coatings, but any claims against these defendants were still subject to principles of res judicata.

C. ELEMENT 2: A SUBSEQUENT ACTION BETWEEN THE SAME PARTIES OR THEIR PRIVIES

Next, we examine whether the RDM II lawsuit was between the same parties or their privies as those

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the fraudulent conveyance defense because, in part, the bankruptcy trustee alone had standing to pursue a claim for a fraudulent conveyance and res judicata barred further litigation on the matter after the trustee abandoned the fraudulent conveyance claim and officially settled the bankruptcy. *Id*. at 878-879, 885. The *Hatchett* court reversed, holding that the trustee abandoned the fraudulent conveyance claim, that the government was entitled to pursue the claim or defense after the bankruptcy proceedings concluded, and that res judicata was not applicable because there was no final judgment on the merits regarding a fraudulent conveyance, given that the trustee had abandoned the claim. *Id*. at 886. We decline to give any weight to *Hatchett*. First, it involved a procedural posture (defense in a civil suit against the government) radically different from the proceedings here or in any of the other cases we have reviewed and cited. Second, the court relied, in part, on cases involving the rights of the Internal Revenue Service and the government to take action. *Id*. Also, there was a formal abandonment of the fraudulent conveyance claim by the trustee, which did not take place in the instant action. Further, the res judicata analysis was woefully cursory. To the extent that *Hatchett* has any relevance here and runs contrary to our ruling, we are not bound by it and reject its application, favoring instead the authorities cited earlier in this opinion.

involved in the bankruptcy proceedings. Plaintiffs contend that the parties in RDM II were not parties to Con-Lighting's bankruptcy case. We disagree.

There is no dispute that RDM and Chestnut, as well as Con-Plastics and Con-Coatings, were all listed as creditors in the bankruptcy proceedings. Creditors in bankruptcy proceedings must be considered parties for purposes of res judicata. *Sanders Confectionary Products, Inc v Heller Financial, Inc*, 973 F2d 474, 480-481 (CA 6, 1992); *Federated Mgt Co v Latham & Watkins*, 138 Ohio App 3d 815, 823; 742 NE2d 684 (2000). "It is undisputed that a creditor of the debtor qualifies as a party for res judicata purposes." *In re G-P Plastics, Inc*, 320 BR 861, 865 (ED Mich, 2005); see also *In re Farmland Industries, Inc*, 376 BR 718, 727 (WD Mo, 2007), remanded on other grounds, 378 BR 829 (CA 8, 2007). The rights and obligations of debtors, creditors, shareholders, and other parties in interest are adjudicated in bankruptcy proceedings for purposes of res judicata. *In re Xpedior Inc*, 354 BR 210, 224 (ND Ill, 2006). Among other rights, creditors are entitled to notice of various bankruptcy proceedings, FRBP 2002, they can participate in the meeting of creditors, 11 USC 341; FRBP 2003, and they can file proofs of claim, 11 USC 501(a). A creditor is a party in interest under the Bankruptcy Code. *In re Thompson*, 965 F2d 1136, 1147 (CA 1, 1992). Accordingly, we conclude that the "same parties" requirement of res judicata was satisfied in the case at bar.[11]

D. ELEMENT 3: RDM II ISSUES COULD OR SHOULD HAVE BEEN LITIGATED IN BANKRUPTCY COURT

Next, we examine the third element of res judicata,

[11] We note that Con-Plastics held the status of a party in the bankruptcy proceedings not only on the basis of its position as a creditor, but also because it was a creditor-shareholder. *Browning v Levy*, 283 F3d 761, 777 (CA 6, 2002).

which is whether the claims in RDM II could or should have been litigated in the bankruptcy proceedings. We find that this issue poses the most difficult part of our analysis and requires careful contemplation of each particular claim.

We begin by emphasizing that under federal res judicata law, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action." *Federated Dep't Stores, Inc v Moitie*, 452 US 394, 398; 101 S Ct 2424; 69 L Ed 2d 103 (1981) (emphasis added). If a party had a full and fair opportunity to litigate a claim in the bankruptcy court but chose not to do so, res judicata bars litigating that claim thereafter in a state court. *Ins Co of State of Pennsylvania v HSBC Bank USA*, 10 NY3d 32, 40; 852 NYS2d 812; 882 NE2d 381 (2008). The important aspect to remember is not whether a particular claim is compulsory; rather, it is whether the claim should have been considered during the bankruptcy proceedings. *Winget v JP Morgan Chase Bank, NA*, 537 F3d 565, 580 (CA 6, 2008).

With respect to plaintiffs' cause of action for a fraudulent conveyance, the claim arose out of the collateral surrender agreement discussed in footnote 4 of this opinion. Count II of the RDM II complaint alleged a violation of the UFTA, asserting that the lease breaches arose before the transfer of assets and obligations, that the transfer was made with the intent to hinder, delay, or defraud plaintiffs and other creditors, that Con-Lighting did not receive reasonably equivalent value in exchange for the transfer, and that at the time of the transfer Con-Lighting was left with an unreasonably small amount of assets despite the fact that it continued to engage in business with plaintiffs under

the leases. The UFTA count further alleged that at the time of the transfer, Con-Lighting should have been aware that it would incur debts beyond its ability to pay, that Con-Lighting was insolvent at the time of the transfer, or became insolvent because of the transfer, that defendants had reasonable cause to believe that Con-Lighting was or became insolvent, and that defendants were "insiders" as defined under the UFTA. Plaintiffs contended that they were entitled "to an attachment against the transferred assets or other property" of defendants to the extent of Con-Lighting's obligations to plaintiffs.

28 USC 157(b)(1) provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, . . . and may enter appropriate orders and judgments[.]" Core proceedings under the Bankruptcy Code include "proceedings to determine, avoid, or recover fraudulent conveyances[.]" 28 USC 157(b)(2)(H). Therefore, a claim under the UFTA would constitute a core proceeding in bankruptcy, allowing the bankruptcy court to render a ruling on a fraudulent conveyance claim. *In re Bliss Technologies, Inc*, 307 BR 598, 604-605 (ED Mich, 2004). A final decision by a bankruptcy court in a core proceeding can be res judicata. *Sanders Confectionary, supra* at 482.

In general, a trustee represents the estate of the debtor, 11 USC 323(a), and he or she has the capacity to sue others or to be sued, 11 USC 323(b). Under 11 USC 544(b)(1), a "trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . ." This section has been coined a strong-arm provision that allows a trustee to step into the shoes of a creditor in an

effort to nullify transfers that are voidable pursuant to state fraudulent conveyance acts for the purpose of benefiting all the debtor's creditors. *In re Fordu*, 201 F3d 693, 698 n 3 (CA 6, 1999); *Nat'l Labor Relations Bd v Martin Arsham Sewing Co*, 873 F2d 884, 887 (CA 6, 1989), mod on reh on other grounds, 882 F2d 216 (CA 6, 1989); *In re Forbes*, 372 BR 321, 330 (CA 6, 2007); *In re Harlin*, 321 BR 836, 838 n 2 (ED Mich, 2005); *Bliss Technologies, supra* at 604. Additionally, 11 USC 548(a)(1) provides a trustee with a mechanism to avoid fraudulent transfers of a debtor's interest without reliance on particular state law, where the statute itself sets forth criteria for determining whether a transfer is fraudulent and can be avoided. See *Donell v Kowell*, 533 F3d 762, 776 n 7 (CA 9, 2008) (11 USC 548 is viewed as the federal fraudulent transfer provision, whereas 11 USC 544[b] authorizes fraudulent transfer actions by the trustee under, in part, applicable state law). 11 USC 550 addresses the liability of a transferee when a transfer of property has been avoided. Accordingly, a trustee has the authority to pursue fraudulent conveyance actions.

Under chapter 7, in relation to the statutory duties of a trustee, the trustee is required to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]" 11 USC 704(a)(1). A chapter 7 trustee must also "investigate the financial affairs of the debtor[.]" 11 USC 704(a)(4). As reflected in the testimony of trustee Shapiro, he would have had a duty to pursue a claim in an adversarial proceeding, FRBP 7001 *et seq.*, seeking to avoid the transfer of Con-Lighting's property had he considered the transfer to actually have been fraudulent. This is because of his duty and obligation to "collect . . . the property of the estate" for which he served. Plaintiffs, however, never brought their con-

cerns to Shapiro's attention, although the record suggests that Shapiro, or his office, had information that might have called for further inquiry, i.e., the discrepancies between the surrender agreement and the bankruptcy documents filed by Con-Lighting's president. Shapiro himself conceded this point in his testimony. If a fraudulent transfer action had been successfully pursued, it would have enlarged the debtor's estate for the benefit of all creditors.

The question becomes whether the authority and duty of the trustee to bring a fraudulent transfer action, when justified, permit us to conclude that there was a full and fair opportunity to litigate the matter and that it should have been litigated, where it would be somewhat speculative whether trustee Shapiro would have actually brought an action even if plaintiffs vigilantly pursued the matter with Shapiro. Our concerns, however, are alleviated by the Sixth Circuit's ruling in *In re Automated Business Sys, Inc*, 642 F2d 200 (CA 6, 1981). In that case, a creditor brought an action in bankruptcy court seeking to require another creditor to return money that had been transferred to it by the debtor, which transfer was allegedly made in an effort to defraud other creditors. The case arose out of a chapter 7 liquidation. An initial question that the Sixth Circuit had to answer was whether the creditor plaintiff could bring the action for a fraudulent transfer, rather than the bankruptcy trustee. The Sixth Circuit found that the creditor had standing to pursue the claim, reasoning:

> Generally if a trustee in bankruptcy defaults in the performance of any duty, such as seeking to set aside a fraudulent transfer, "the court may upon application direct him in his duty or, if he be recalcitrant, remove him for disobedience, or permit a creditor to act in his name." [*Id.* at 201 (citation omitted).]

The Sixth Circuit court agreed with the bankruptcy court that a creditor who believes that a lawsuit should be commenced has the right to petition the bankruptcy court in an effort to compel the trustee to take action, or to seek permission to prosecute the lawsuit. *Id.*

In a case involving an alleged fraudulent transfer, *In re Gibson Group, Inc*, 66 F3d 1436, 1446 (CA 6, 1995), the Sixth Circuit applied a rule comparable to that utilized in *Automated Business*, but did so in the context of a chapter 11 case. The court, referring to *Automated Business*, stated that "[w]e established in that case that a creditor could initiate an avoidance action with the permission of the court, after making a demand upon the trustee and if the trustee defaulted in his duty." *Gibson Group, supra* at 1443.

On the strength of *Automated Business* and *Gibson Group*, we find no merit in plaintiffs' argument here that they could not force the trustee to act and that, therefore, it could not be said that their fraudulent conveyance claim could have been litigated in the bankruptcy court. Had plaintiffs pursued the matter with trustee Shapiro, and had Shapiro refused to file a fraudulent transfer action, plaintiffs would have had redress with the bankruptcy court, possibly leading to plaintiffs filing their own claim or Shapiro being ordered to pursue the claim. While it is true that the bankruptcy court, in such a scenario, could conceivably have rejected plaintiffs' efforts, an appeal would have been possible and the bankruptcy court's decision-making process on the matter would necessarily have contemplated the validity and soundness of a fraudulent transfer claim. In other words, plaintiffs would have had their day in court to some degree. With the avenues available to plaintiffs in the bankruptcy proceedings to have their fraudulent transfer issues ad-

dressed, their decision to do nothing implicates some of the underlying purposes of res judicata, which include conservation of judicial resources and prevention of inconsistent decisions. Indeed, if plaintiffs were allowed to pursue the UFTA claim in state court, and were they successful in obtaining the requested relief attaching the transferred assets, MCL 566.37(1)(b) (attachment relief for UFTA violation), an underlying premise upon which the relief was awarded would be that the property should have remained in the hands of Con-Lighting. This conclusion would run contrary to the trustee's accounting in bankruptcy showing that Con-Lighting had zero assets to disburse and it would offend the rights of other creditors.

We conclude that the third element of res judicata was satisfied in regard to the fraudulent conveyance claim.

With respect to the claim seeking to pierce the corporate veil, plaintiffs asserted that Con-Plastics was a 49 percent owner of Con-Lighting, that Con-Lighting was a mere instrumentality of Con-Plastics, that the corporate entity known as Con-Lighting was used to commit a fraud or wrong against plaintiffs, and that plaintiffs suffered an unjust loss as a result of the fraud or wrong. We initially note that the complaint, as well as the documentary evidence, lends no support for a conclusion that Con-Coatings, which held no interest in Con-Lighting, and holds no interest in Con-Plastics, is liable to plaintiffs under a corporate veil theory. Thus, Con-Coatings is entitled to summary disposition on this claim under both MCR 2.116(C)(8)[12] and (10). The claim pertains solely to Con-Plastics.

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[12] MCR 2.116(C)(8) provides for summary disposition when the plaintiff "failed to state a claim on which relief can be granted."

As stated above, 11 USC 704(a)(1) provides that the trustee is required to "collect and reduce to money the property of the estate for which such trustee serves[.]" "Property of the estate" is composed of, in part, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 USC 541(a)(1). This definition applies to property "wherever located and by whomever held[.]" 11 USC 541(a). "It is clear that *causes of action* belonging to the debtor prior to bankruptcy constitute estate property, and that [11 USC 704(a)(1)] grants the bankruptcy trustee the authority to pursue such causes of action." *In re RCS Engineered Products Co, Inc*, 102 F3d 223, 225 (CA 6, 1996) (emphasis added). The question whether a particular cause of action is available to a debtor, thereby constituting property of the estate under 11 USC 704(a)(1) and 11 USC 541(a)(1), is determined by applicable state law. *RCS Engineered, supra* at 225, citing *Butner v United States*, 440 US 48; 99 S Ct 914; 59 L Ed 2d 136 (1979).

In *Kalb, Voorhis & Co v American Financial Corp*, 8 F3d 130, 132 (CA 2, 1993), the federal court stated:

> The initial inquiry herein is whether a claim alleging that the debtor or bankrupt is the alter ego of its controlling stockholder constitutes "property" of the bankruptcy estate or debtor-in-possession within the scope of [11 USC 541(a)]. Property of the estate does not belong to any individual creditor. If under governing state law the debtor could have asserted an alter ego claim to pierce its own corporate veil, that claim constitutes property of the bankrupt estate and can only be asserted by the trustee or the debtor-in-possession. As this Court stated:
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> * * *
>
> ". . . If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by

> any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." [Citation omitted.]

If an alter ego claim is indeed the property of a bankruptcy estate, the trustee has full authority over the claim, and before a creditor may pursue such a claim, there must be a judicial determination that the trustee has abandoned the claim. *Steyr-Daimler-Puch of America Corp v Pappas*, 852 F2d 132, 136 (CA 4, 1988). Without an abandonment determination, a creditor cannot pursue an alter ego claim. *Id.* Alter ego theories cannot be pursued by anyone other than a chapter 7 trustee in the absence of abandonment or the grant of derivative standing. *In re Charles Edwards Enterprises, Inc*, 344 BR 788, 790 (ND W Va, 2006).[13]

We now turn to the issue whether, under Michigan law, the debtor Con-Lighting, and thus the trustee, could have asserted a claim to pierce Con-Lighting's own corporate veil in the chapter 7 bankruptcy proceedings. We conclude that *RCS Engineered* commands us to conclude that the answer is no, given a lack of subsequent authority to the contrary. In *RCS Engineered*, the court addressed an alter ego claim and a bankruptcy trustee's standing to assert the claim against a parent corporation under the "property of the estate" provisions in 11 USC 704 and 11 USC 541. The court ruled, "A review of Michigan alter ego cases and basic principles of the law of corporations leads us to conclude . . . that under Michigan law a subsidiary does

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[13] Generally speaking, courts that allow a trustee or debtor to bring an alter ego claim do so under 11 USC 541. *In re Icarus Holding, LLC*, 391 F3d 1315, 1319 (CA 11, 2004) (citing precedent from the Second, Fifth, and Seventh circuits). Following the lead of many other courts, the Eleventh Circuit has held that in order for a trustee to bring an alter ego claim, the claim should be (1) a general claim that is common to all the debtor's creditors and (2) allowable under state law. *Id*. at 1319-1320.

not have standing to sue its shareholders or its parent company under an alter ego theory." *RCS Engineered, supra* at 226. Rather, "courts apply the alter ego theory and disregard a company's separate corporate identity for the benefit of third parties, *e.g.*, creditors of the corporation, who would suffer an unjust loss or injury unless the shareholders or the parent corporation were held liable for the subsidiary's debts." *Id.* The court held:

> Since a subsidiary may not bring an alter ego claim against its parent company under Michigan law, the claim does not become the property of the estate under [11 USC 541(a)(1)] of the Bankruptcy Code when the subsidiary files a petition for bankruptcy. Accordingly, the subsidiary's bankruptcy trustee may not bring an alter ego claim under [11 USC 704(1)] of the Code. Thus, we conclude that the bankruptcy court erred in holding that . . . [the] bankruptcy trustee ha[d] standing under these sections to assert an alter ego claim . . . ." [*Id.* at 227.]

We agree with defendants' assertion that Con-Lighting was not technically a subsidiary, which has been defined as a company with more than half of its stock owned by another company, because Con-Plastics held only a 49 percent interest. See *Liggett Group, Inc v Ace Prop & Cas Ins Co*, 798 A2d 1024, 1035 (Del, 2002). However, although *RCS Engineered* spoke at times in terms of subsidiaries, it also used very broad language at other times, stating that "[t]he general rule is that the corporate veil is pierced only for the benefit of third parties, and never for the benefit of the corporation or its stockholders," and that "[t]here is simply nothing in the cases to suggest that Michigan courts would allow an alter ego claim to be brought in other than third-party situations." *RCS Engineered, supra* at 226-227. Moreover, the United States District Court for the Eastern District of Michigan has relied on *RCS Engi-*

neered in disallowing a trustee to pursue an alter ego claim, stating that alter ego claims not involving third-party situations are not recognized in Michigan. *Nieto v Unitron, LP*, 2006 US Dist LEXIS 54443, unreported opinion of the United States District Court for the Eastern District of Michigan, Southern Division, issued August 7, 2006 (Docket No. 06-11966).[14] Furthermore, in *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004), this Court stated that " '[t]he traditional basis for piercing the corporate veil has been to *protect a corporation's creditors*[.]' " (Citation omitted; emphasis added.) Accordingly, trustee Shapiro, despite his testimony to the contrary, could not pursue an alter ego theory piercing Con-Lighting's corporate veil because such a claim was not "property of the estate" under Michigan law. Further, because Shapiro did not have the authority to proceed on a theory to pierce Con-Lighting's corporate veil, thereby making the issue of claim abandonment moot, plaintiffs themselves could not have pursued the claim on a derivative basis; nor does there exist an independent basis under the Bankruptcy Code for them to file such a claim against Con-Plastics. Therefore, for purposes of res judicata, it cannot be concluded that plaintiffs could or should have litigated the corporate veil claim in the bankruptcy proceedings. The trial court erred in dismissing this claim or theory on the basis of res judicata arising out of the bankruptcy proceedings. We will later discuss defendants' arguments that the corporate veil claim

[14] While *Nieto* is an unreported opinion, it has value because the bankruptcy court at issue here is also from the Eastern District, Southern Division. Therefore, *Nieto* sheds light on the issue whether trustee Shapiro could have pursued the corporate veil claim. Bankruptcy court appeals go to the federal district court for review. 28 USC 158(a); *In re DSC, Ltd*, 486 F3d 940, 943 (CA 6, 2007). And the district court reviews de novo questions of law that had been presented to the bankruptcy court. *In re Gardner*, 360 F3d 551, 557 (CA 6, 2004).

should be summarily dismissed under MCR 2.116(C)(10) and res judicata grounded on the RDM I litigation.

With respect to the successor liability claim, plaintiffs asserted that defendants expressly or implicitly assumed the obligations of Con-Lighting, that the transfer of assets and certain obligations in advance of bankruptcy was fraudulent and undertaken in bad faith to avoid liability to plaintiffs and other Con-Lighting creditors, that Con-Lighting did not receive reasonably equivalent value in return for the asset transfer, and that defendants were engaged in a mere continuation or reincarnation of Con-Lighting's business. Therefore, according to plaintiffs, defendants were liable to plaintiffs for the full amount of Con-Lighting's debts owed to plaintiffs. We initially note that the documentary evidence lends no support for a conclusion that Con-Plastics was Con-Lighting's corporate successor or that it carried on the business operations of Con-Lighting after Con-Lighting ceased operations. Rather, the evidence pointed only to Con-Coatings continuing the business operations previously undertaken by Con-Lighting, although Con-Plastics served as a conduit to some degree. Con-Plastics' role as an alleged successor is tied solely to plaintiffs' allegations concerning the fraudulent transfer of assets; however, we find that this aspect of the successor liability claim was subsumed under the UFTA claim, which was properly dismissed on the basis of res judicata. Thus, Con-Plastics is entitled to summary disposition on this claim under MCR 2.116(C)(10). For the same reasons, we will not permit plaintiffs to pursue any fraudulent transfer allegations against Con-Coatings under the guise of a successor liability claim. Further, there is no evidence that Con-Coatings expressly or implicitly assumed Con-Lighting's lease obligations. Thus, continuity of enter-

prise or operations relative to Con-Coatings is the only basis that could potentially serve to support the successor liability claim. We now proceed with the res judicata analysis of the successor liability claim, as whittled down by us.

We are not aware of any relevant Sixth Circuit precedent on whether a successor liability claim by a predecessor company against a successor company is considered property of the bankruptcy estate, so that a trustee could have pursued a claim in the bankruptcy proceedings. The analytical framework for addressing the successor liability claim is the same as used earlier in this opinion with respect to the corporate veil claim, in that 11 USC 704(a)(1) and 11 USC 541(a)(1) serve as the foundation of the analysis. However, we find it unnecessary to perform a review of Michigan law to determine if a predecessor company, if not yet defunct or dissolved, can sue a successor company.[15] We cannot conclude with any level of confidence, for reasons discussed later in this opinion, that plaintiffs could have pursued a successor liability claim in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division.

Initially, we reject defendants' contention that the successor liability claim, as well as the other claims, all constituted core proceedings that could only be addressed in the bankruptcy court. While the UFTA claim

[15] While we have not fully surveyed Michigan caselaw on the matter, we are not aware of anything that would preclude such a lawsuit, although it is typically third parties, e.g., creditors and victims of defective products or negligence, that pursue such suits. See, e.g., *Craig v Oakwood Hosp*, 471 Mich 67; 684 NW2d 296 (2004); *Foster v Cone-Blanchard Machine Co*, 460 Mich 696; 597 NW2d 506 (1999); *Turner v Bituminous Cas Co*, 397 Mich 406; 244 NW2d 873 (1976). And there certainly are bankruptcy courts that have entertained successor liability lawsuits. See, e.g., *In re Sunsport, Inc*, 260 BR 88 (ED Va, 2000).

qualified as a core proceeding, as indicated already in this opinion, the corporate veil and successor liability claims did not. In *Sanders Confectionary, supra* at 483, the Sixth Circuit stated:

> The bankruptcy judge rules on whether a particular proceeding is a core proceeding. 28 U.S.C. § 157(b)(3). The court looks at both the form and the substance of the proceeding in making its determination. . . . A core proceeding either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy . . . . In non-core proceedings that are "related to" the bankruptcy case, the bankruptcy judge may hear the matter and "submit proposed findings of fact and conclusions of law to the district court," but without the parties consent the bankruptcy court may not make a final decision on the matter. 28 U.S.C. § 157(c).

Successor liability and alter ego claims are not core proceedings because they are not claims against the assets of the estate and they do not deal with the relationship between a debtor and its creditors, but instead target the assets of a nondebtor. *In re G-I Holdings, Inc*, 295 BR 211, 217 (D NJ, 2003). "Case law dealing with bankruptcy litigation of successor liability and veil piercing issues confirms that this action is not a core proceeding." *Id.*; see also *Phar-Mor, Inc v Coopers & Lybrand*, 22 F3d 1228, 1239 (CA 3, 1994); *In re Julien Co*, 120 BR 930, 937 (WD Tenn, 1990) ("veil piercing or *alter ego* theory could not be a core proceeding"); but cf. *Central Vermont Pub Service Corp v Herbert*, 341 F3d 186, 192 (CA 2, 2003). A successor liability claim can exist outside bankruptcy, it is not created by the Bankruptcy Code, and it does not require resort to concepts peculiar to bankruptcy for resolution; therefore, it is not a core proceeding. *G-I Holdings, supra* at 217. At best, plaintiffs' successor liability and corporate veil claims were related to the bankruptcy case. Accordingly,

defendants' arguments that the successor liability and corporate veil claims entailed core proceedings and that they had to be litigated in the bankruptcy court lack merit.[16] Furthermore, pursuant to 28 USC 1334(b), which governs jurisdiction in bankruptcy cases, bankruptcy courts have full and exclusive jurisdiction over the bankruptcy case itself, but they lack sole and exclusive jurisdiction over civil proceedings, including core proceedings. *In re Lenke*, 249 BR 1, 6 n 4 (D Ariz, 2000). "The bankruptcy court has original but not exclusive jurisdiction over fraudulent transfer claims." *In re Int'l Admin Services, Inc*, 211 BR 88, 95 n 4 (MD Fla, 1997).

The caselaw is split with respect to whether res judicata attaches to a non-core proceeding. Some of the cases rejecting the application of res judicata to non-core proceedings are *Barnett v Stern*, 909 F2d 973, 979 (CA 7, 1990) (district court claim by creditor only barred by res judicata if the claim would have been a core proceeding in bankruptcy), *Howell Hydrocarbons, Inc v Adams*, 897 F2d 183, 190 (CA 5, 1990), and *SMI/USA, Inc v Profile Technologies, Inc*, 38 SW3d 205, 211 (Tex App, 2001) (disposition of non-core proceedings in bankruptcy "is not res judicata as to subsequent state court proceedings regarding the same claims"). The Sixth Circuit, however, allows imposition of res judicata in regard to non-core proceedings. *Sanders Confectionary, supra* at 483 (even though bankruptcy court may not be able to issue a final decision, federal district court has the authority to do so). In *Cabrera v First Nat'l Bank of Wheaton*, 324 Ill App 3d 85, 97; 753

[16] We note that the mere fact that the UFTA claim was a core proceeding does not mean that the non-core successor liability claim becomes a core proceeding. *In re Exide Technologies*, 544 F3d 196, 206 (CA 3, 2008).

NE2d 1138 (2001), the Illinois Appellate Court, with supporting citations, observed that "[s]everal federal circuits reject the distinction between core and noncore claims for the purpose of *res judicata*," generally because the bankruptcy judge and the district court can together provide full and fair litigation of a non-core claim. The *Cabrera* court also noted that a legal commentator has charged that the courts rejecting application of res judicata to non-core proceedings demonstrate confusion between jurisdiction and power. *Id.* "It thus appears that the position of the Fifth and Seventh Circuits has been widely rejected, with the opposite view holding prominence in the federal courts." *Id.*

We decline to become embroiled in this debate for a very practical reason, which is the unreported opinion of *Nieto* by the United States District Court for the Eastern District of Michigan, Southern Division, issued in 2006, the same year that the bankruptcy case here was closed. In *Nieto*, Unitron, Inc., filed for chapter 7 bankruptcy, claiming that it had $12,000 in assets and in excess of $300,000 in liabilities. At the same time the bankruptcy petition was filed, Unitron, LP, unilaterally terminated vested benefits of former employees of a Unitron plant in Troy. The employees and their union filed suit in the district court against Unitron, LP, alleging that it was a "disguised continuance and the alter ego" of Unitron, Inc., where they had "substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." *Nieto*, *supra* at *5-6. The court addressed the issue whether the plaintiffs had standing to pursue their claims in district court or whether the claims had to be pursued by the trustee in the bankruptcy proceedings involving Unitron, Inc. The court noted that the parties agreed that the " 'property of the estate' " did not belong to any individual creditor. *Id.* at *13 (citation

omitted). The court, relying on *RCS Engineered*, held that the claims were not property of the estate under 11 USC 541(a)(1), that the trustee thus did not have standing to pursue the claims, and that therefore the automatic stay provision of the Bankruptcy Code did not operate as a bar to the plaintiffs' lawsuit in district court. *Id*. at *21-22.

Regardless of the fact that *Nieto* was unreported, and without commenting on the correctness of the ruling, it certainly provides some insight into how a bankruptcy court in that same federal district and division may have handled an attempt to pursue a successor liability claim by trustee Shapiro. We cannot in good faith rule that a successor liability claim should and could have been pursued and fully litigated in the bankruptcy court when the district court in that jurisdiction has rejected a nearly identical claim.

E. ELEMENT 4: IDENTITY OF THE CAUSES OF ACTION

Finally, we examine the fourth element of res judicata, which requires an identity of the causes of action. Given the rulings we made earlier, only the fraudulent conveyance claim remains relevant. We first conclude that plaintiffs have failed to address this element. Moreover, this element is satisfied if the claims arose out of the same transaction or same series of transactions, or if the claims arose out of the same core operative facts. *Winget, supra* at 580. "In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." *I A Durbin, Inc v Jefferson Nat'l Bank*, 793 F2d 1541, 1549 (CA 11, 1986). Here, of course, no claims were raised in the bankruptcy court. It would be incorrect, however, to conclude that because the particular claims were not raised in the bankruptcy proceedings, no

identity of claims exists. *Sanders Confectionary, supra* at 483-484. Instead, "[i]dentity of causes of action means an 'identity of the facts creating the right of action and of the evidence necessary to sustain each action.' " *Id.* at 484, quoting *Westwood Chem Co v Kulick*, 656 F2d 1224, 1227 (CA 6, 1981). Had plaintiffs raised the fraudulent conveyance claim in the bankruptcy proceedings, as they should have done, the claim would have arisen out of the same transaction and core operative facts giving rise to the claim contained in RDM II; the substance of the actions would be identical. Accordingly, the fourth element of res judicata was satisfied. Therefore, defendants were entitled to summary disposition with respect to the fraudulent conveyance claim on the basis of res judicata grounded on the bankruptcy proceedings.

VI. RES JUDICATA GROUNDED ON RDM I

Defendants present a cursory argument that plaintiffs' claims are barred by res judicata grounded on the RDM I lawsuit. In *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999), our Supreme Court stated:

> Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. [Citations omitted.]

Here, although an order granting partial summary disposition in favor of RDM was entered, the case was left open and hanging in limbo by the filing of Con-Lighting's bankruptcy petition and the entry of a stay. Moreover, the evidence or essential facts in RDM I dealt only with the alleged lease breaches in connection with

the Merrill Road property, and while those breaches formed part of the RDM II litigation, the evidence and essential facts related to the successor liability and corporate veil claims were not identical to those in RDM I and they developed later in time and required exposure through the discovery process. Further, Chestnut was not a party to the RDM I lawsuit, nor were defendants before the bankruptcy stay or before the RDM II suit was filed.[17] Additionally, defendants' assertion that they were "putative privies" is not a claim that they were actual privies for purposes of res judicata and is instead, effectively, a contention that they were not privies.

Defendants' argument is more in the nature of a claim that they should have been joined as parties in RDM I and that plaintiffs, upon joinder, should have litigated the successor liability, fraudulent conveyance, and corporate veil claims. Such an argument is not one of res judicata, but necessary joinder under MCR 2.205, which we find was not implicated under the circumstances presented.

VII. MCR 2.116(C)(10): PIERCING OF THE CORPORATE VEIL AND SUCCESSOR LIABILITY

We conclude that issues of fact abound in regard to the corporate veil and successor liability claims. We first

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[17] Through an unusual procedure, the trial judge in RDM II, who also presided over RDM I, permitted defendants to intervene in RDM I during the pendency of RDM II. The purpose was to give defendants the opportunity to seeks reconsideration of the order granting partial summary disposition in RDM I. The trial court denied reconsideration. To the extent that this occurrence made them "parties" to the RDM I lawsuit, no further litigation or rulings took place in RDM I, and we are not prepared to hold that res judicata was implicated merely by this quirky procedural step. Furthermore, when they became "parties" to RDM I, they were already parties to the RDM II lawsuit.

address plaintiffs' claim seeking to pierce the corporate veil. "The law treats a corporation as an entirely separate entity from its shareholders, even where one individual owns all the corporation's stock." *Rymal, supra* at 293. However, as explained in *Rymal, id.* at 293-294, the protection afforded by the corporate veil can be pierced under certain circumstances:

> "The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations." . . .
>
> For the corporate veil to be pierced, the corporate entity must be a mere instrumentality of another individual or entity. Further, the corporate entity must have been used to commit a wrong or fraud. Additionally, and finally, there must have been an unjust injury or loss to the plaintiff. There is no single rule delineating when a corporate entity should be disregarded, and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused. [Citations omitted.]

Here, there was documentary evidence that Con-Plastics, a 49 percent owner of Con-Lighting, and its president, Anthony Catenacci, fully controlled every aspect of the operations at Con-Lighting, including the decision to cease operations and file for bankruptcy to the detriment of numerous creditors. Gregory Eaton testified that, despite an operating agreement indicating that he had provided $204,000 for his 51 percent interest in Con-Lighting, he never paid any money for his interest. Rather, the funds were "loaned" to him by either Con-Plastics or Catenacci; however, there was no loan agreement, Eaton never paid any money toward the loan, and no one ever asked Eaton to repay the loan. Eaton testified that he had no knowledge of the Comerica assignment or the surrender agreement. He did

not make the decision to cease Con-Lighting's operations or to file for bankruptcy, nor did he authorize anyone to make those decisions on his behalf. Further, Eaton did not have any involvement in shifting property or operations from Con-Lighting to Con-Coatings. Catenacci testified that he made the decision to shutter operations. The evidence suggested that Eaton was a mere figurehead placed in the position solely to allow Con-Lighting to claim minority-ownership status.

Additionally, documentary evidence was presented showing that Con-Plastics had loaned millions of dollars to Con-Lighting and its predecessors over the years to keep the business operating and afloat, despite the fact that the enterprise continued to lose money. There was evidence that Con-Lighting did not honor various lease obligations, although the decision to cease operations had already been made and a plan conceived to convert operations to Con-Coatings.[18] There was evidence that Con-Lighting equipment started to be moved out in September or October 2004 and found its way to Con-Coatings, which had hired several Con-Lighting employees in mid-October, even though evidence also showed that Con-Lighting benefited by remaining on the Merrill Road property past the lease expiration date, implicating the holdover provision and payment obligation. This could be viewed as wrongfully taking advantage of the corporate entity, whose life was coming to an end with bankruptcy on the horizon, to the detriment of plaintiffs.

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[18] The record contains several documents generated by GM referencing contracts and stating under the heading "line item notes":

> Purchase order is being issued per request from John Lowe, Continental Lighting, dated 8/19/04 to transfer business from . . . Continental Lighting to Continental Coatings.

In sum, there was sufficient documentary evidence to create an issue of fact regarding whether Con-Lighting was a mere instrumentality of Con-Plastics, whether the corporate entity of Con-Lighting was used to commit a wrong or fraud, and whether there was an unjust injury or loss to plaintiffs. Con-Plastics was not entitled to summary disposition under MCR 2.116(C)(10) with respect to the corporate veil claim.[19]

With respect to the successor liability claim against Con-Coatings, our Supreme Court explained the theory in *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702-704; 597 NW2d 506 (1999):

> The traditional rule of successor liability examines the nature of the transaction between predecessor and successor corporations. If the acquisition is accomplished by merger, with shares of stock serving as consideration, the successor generally assumes all its predecessor's liabilities. However, where the purchase is accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies. The five exceptions are as follows:
>
> "(1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger; (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation."

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[19] We do wish to emphasize that, in light of our ruling that the UFTA claim should have been litigated in the bankruptcy proceedings and is thus barred, plaintiffs are not permitted to claim a fraudulent conveyance arising out of the surrender agreement as evidence in support of piercing the corporate veil. This applies equally to the successor liability claim.

> [P]olicy concerns shaped this Court's expansion of the traditional rule in *Turner* [*v Bituminous Cas Co*, 397 Mich 406; 244 NW2d 873 (1976)]. After examining the relevant policy concerns, this Court in *Turner* concluded that a continuity of enterprise between a successor and its predecessor may force a successor to "accept the liability with the benefits" of such continuity. *Turner* held that a prima facie case of continuity of enterprise exists where the plaintiff establishes the following facts: (1) there is continuation of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations of the predecessor corporation; (2) the predecessor corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible; and (3) the purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the selling corporation. *Turner* identified as an additional principle relevant to determining successor liability, whether the purchasing corporation holds itself out to the world as the effective continuation of the seller corporation. [Citations and some quotation marks omitted.]

As indicated earlier in this opinion, the continuing enterprise theory (mere continuation or reincarnation of the old corporation) is the only theory that can be pursued by plaintiffs at trial. Much of the evidence discussed above in relation to the corporate veil claim is equally relevant to the successor liability claim. There was documentary evidence reflecting a continuity of management, personnel, assets, and general business operations.[20] There was also evidence that Con-Lighting ceased operations around the time of the changeover to

[20] Con-Lighting president Kenneth Lamb became a manufacturing manager for Con-Coatings, John Lowe, a plant manager for Con-Lighting, became a manager for Con-Coatings, and other former Con-Lighting personnel became employed by Con-Coatings. Much of Con-Lighting's equipment flowed to Con-Coatings.

Con-Coatings, or the plan to so proceed, and sought liquidation in chapter 7 bankruptcy proceedings soon thereafter. Eaton testified that Con-Lighting customers, chiefly GM and DaimlerChrysler, communicated concerns about obligations being satisfied and that Kenneth Lamb and John Lowe worked on alleviating those concerns. There was evidence that GM and DaimlerChrysler began sourcing or procuring parts from Con-Coatings that had previously been provided by Con-Lighting.[21] There was evidence that Con-Lighting's suppliers started supplying Con-Coatings and that Con-Coatings's books showed a dramatic increase in gross receipts in 2005, at least partly attributable to business generated by GM and DaimlerChrysler purchasing parts from Con-Coatings. A reasonable juror could surmise from the evidence that Con-Coatings was holding itself out to the world as the effective continuation of Con-Lighting. In sum, a genuine issue of material fact exists whether Con-Coatings can be held liable under a successor liability theory.[22]

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[21] John Lowe testified that he met several times with GM and DaimlerChrysler personnel about Con-Lighting shutting down production. Kenneth Lamb and others were also present at these meetings, which took place between August and October 2004. Lowe indicated that there was a general goal or plan that Con-Lighting's equipment and operations would eventually move or be resourced to Con-Coatings. Lowe conceded that, at some point, some of Con-Lighting's equipment and business did indeed end up at Con-Coatings. Equipment started to be moved in either September or October 2004. Lowe indicated that Con-Lighting had about 50 to 70 purchase orders in 2004 and was manufacturing 30 different parts at the time. According to Lowe, GM and DaimlerChrysler "approved the resource of all of the business that Continental Lighting had over to Continental Coatings." Lowe stated that GM had not previously done business with Con-Coatings and that he had to obtain a DUNS (identification) number for Con-Coatings. Lowe testified that on customer approval, contracts were issued to Con-Coatings.

[22] Of course, plaintiffs must also prove the underlying allegations regarding the lease breaches.

VIII. CONCLUSION

The trial court did not err in dismissing the UFTA claim on the basis of res judicata with respect to both defendants. The trial court, however, did err in dismissing the corporate veil and successor liability claims on the basis of res judicata grounded on the bankruptcy proceedings. Neither defendant is entitled to summary disposition on the basis of res judicata grounded on the RDM I lawsuit. Defendant Con-Coatings is entitled to summary disposition under MCR 2.116(C)(8) and (10) in regard to the corporate veil claim. Defendant Con-Plastics is entitled to summary disposition under MCR 2.116(C)(10) in regard to the successor liability claim. Finally, there are genuine issues of material fact with respect to the successor liability claim against Con-Coatings and in regard to the corporate veil claim against Con-Plastics.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

PEOPLE v PLUNKETT

Docket No. 284943. Submitted November 4, 2008, at Lansing. Decided December 16, 2008, at 9:05 a.m. Leave to appeal sought.

The 1st District Court, Terrence P. Bronson, J., bound Ronald J. Plunkett over for trial in the Washtenaw Circuit Court on charges of delivering a controlled substance (heroin), thereby causing death, and delivering less than 50 grams of heroin. Evidence at the preliminary examination indicated that the defendant had driven Tracy Corson to a drug dealer's location and given her money for her purchase of heroin and that Corson had shared the heroin with Tiffany Gregory within an hour of Gregory's death from a drug overdose. The defendant, whom the prosecution claimed constructively delivered, or aided and abetted the drug dealer's delivery of, the heroin to Corson, moved to quash the bindover in the circuit court, and that court, Melinda Morris, J., granted the motion. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

The defendant did not constructively deliver the heroin, nor did he aid and abet its delivery.

1. A person constructively delivers a controlled substance when he or she directs another person to convey the controlled substance under his or her direct or indirect control to a third person or entity. Here, the heroin was not under the defendant's control, nor did the defendant direct the drug dealer to transfer the heroin to Corson.

2. The phrase "aids and abets" describes any assistance given to the perpetrator of the crime by words or deeds that are intended to encourage, support, or incite the commission of that crime. The statutes under which the defendant was charged, MCL 750.317a and MCL 333.7401(2)(a)(*iv*), criminalize the actions of a person who delivers a controlled substance. Here, no evidence was presented to support a finding that the defendant aided and abetted the drug dealer in delivering the heroin to Corson.

Affirmed.

SCHUETTE, J., dissented and would reverse and remand for further proceedings, stating that there was sufficient evidence to support a conclusion that the defendant aided and abetted the delivery of heroin to Corson. The defendant, by driving Corson and giving her money for the purchase of heroin, performed acts that assisted the commission of the crimes charged.

1. CONTROLLED SUBSTANCES — CONSTRUCTIVE DELIVERY OF CONTROLLED SUBSTANCES.

A defendant constructively delivers a controlled substance by directing another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity.

2. CRIMINAL LAW — AIDING AND ABETTING CRIMES.

To aid and abet the commission of a crime is to give any assistance to the perpetrator of the crime that encourages, supports, or incites the commission of the crime.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *David A. King*, Senior Assistant Prosecuting Attorney, for the people.

John A. Shea and *Kevin S. Gentry* for the defendant.

Before: FITZGERALD, P.J., and BANDSTRA and SCHUETTE, JJ.

FITZGERALD, P.J. The prosecution appeals by delayed leave granted the circuit court's order granting defendant's motion to quash the district court's bindover for trial on charges of delivery of a controlled substance (heroin), thereby causing death, MCL 750.317a; and delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*).[1] We affirm.

[1] The circuit court denied defendant's motion to quash the district court's order binding defendant over on one count of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), and one count of maintaining a drug house, MCL 333.7405(1)(d).

I. FACTS AND PROCEDURAL HISTORY

The following relevant facts were established at the preliminary examination. Tracy Corson was a prostitute who first met defendant through a drug dealer, Darryl Shavers, who informed her that defendant wanted the company of a female who would "be provided drugs to go and get high at his house." Shavers drove Corson to defendant's apartment in February 2006 and provided crack cocaine to defendant before leaving the apartment. Corson and defendant used crack cocaine and watched pornography throughout the evening. Defendant gave Corson $380 when she left.

Corson again contacted defendant on May 20, 2006, and met with him on that day "to get high and to get money from him." Corson moved in with defendant during the Memorial Day weekend of 2006. Corson stopped working as a prostitute after moving in with defendant and was not employed. According to Corson, she and defendant drove to Detroit daily to purchase drugs from a drug dealer, Harold Spencer, with whom Corson was acquainted before meeting defendant. She indicated that "on average we would buy around a [sic] eight ball of crack and a bundle, if not more, of heroin." According to Corson, she used crack cocaine and heroin, but defendant used only crack cocaine. Corson used the entire amount of heroin in one day, while the crack cocaine lasted "a few hours" for Corson and defendant.

In early June 2006, Corson contacted Tiffany Gregory, a childhood friend and the victim of the alleged homicide. The two met at Gregory's apartment twice in June. During the first meeting, Corson introduced Gregory to heroin and taught her how to prepare the drug. During the second meeting, Gregory loaned Corson $100 and drove Corson to Detroit to purchase

drugs. The two then returned to Gregory's apartment and used crack cocaine and heroin.

On June 15, 2006, defendant and Corson traveled to Detroit in defendant's vehicle to purchase drugs from Spencer. Defendant gave Corson $200 to purchase crack cocaine and heroin. Corson left defendant's vehicle and entered Spencer's vehicle to make the purchase. After handing Spencer the money and receiving the heroin and crack cocaine, Corson returned to defendant's vehicle. On the drive home from Detroit, defendant and Corson smoked crack cocaine, and Corson injected three packets of heroin.

That same night, Gregory went to a bar with Andrew Voltattorni. Gregory consumed alcohol throughout the evening and left the bar when it closed at 2:00 a.m. Later, Gregory, her roommate Ashley, and Voltattorni went to a pizza restaurant. Gregory received several telephone calls while at the restaurant, including one from Corson. After talking to Corson on the phone, Gregory spoke to Voltattorni about using heroin. Gregory told Voltattorni that Corson owed her $20 and she wanted to be paid back with $20 worth of heroin.

Gregory called Corson at approximately 3:00 a.m. on June 16, 2006, asking for drugs and reminding Corson that she owed Gregory $20. Corson invited Gregory to defendant's apartment. Gregory arrived at 3:30 a.m., and she was intoxicated but able to walk and talk. Corson, Gregory, defendant, and his friend Veronica smoked crack cocaine in the living room. Afterward, Gregory and Corson went into a bedroom and injected themselves with heroin.[2] Gregory thereafter slumped over and Corson called for help. While Veronica administered cardiopulmonary resuscitation (CPR) to Gre-

[2] According to Corson, defendant did not possess any heroin and did not know that Corson was going to give heroin to Gregory.

gory, Corson hid the drugs and drug paraphernalia in the laundry room. Gregory was dead by the time emergency personnel arrived at 4:30 a.m.[3]

Dr. Yung Chung performed an autopsy on Gregory and concluded that the death was accidental and caused by "multiple drug intoxication." She testified that Gregory's body had a high morphine content of 269 nanograms, cocaine metabolites, and a high alcohol content. She indicated that heroin changes into morphine once it enters the body and that Gregory had three times the normal recreational-use level of that drug in her body. Dr. Chung opined that Gregory died from a heroin overdose that was exacerbated by the alcohol she had consumed.

Following the presentation of the proofs, defendant argued against a bindover on the charges of delivery of heroin causing death and delivery of less than 50 grams of heroin on the ground that there was no evidence that defendant ever possessed the heroin or transferred the heroin to anyone. He maintained that, at most, the prosecutor had shown that defendant funded Corson's heroin purchase. He also maintained that a purchaser of heroin could not be convicted of aiding and abetting the delivery of heroin. The prosecutor argued that even though defendant had not possessed the heroin, he provided the transportation to Detroit and the money used to purchase the heroin. The district court concluded that defendant drove Corson to buy drugs on a regular basis, that he gave her money to purchase the drugs, and that the heroin purchased on June 15 caused Gregory's death. On that basis, the court found sufficient probable cause to bind defendant over on all four counts.

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[3] Officer Eric Bowles testified that Gregory was not breathing, her nose and ears were blue in color, and she appeared dead.

Defendant moved to quash the bindover, asserting that with respect to the charges of delivery of heroin causing death and delivery of heroin, the prosecutor failed to present evidence on the element of delivery. Specifically, defendant asserted that with respect to the charge of delivery of heroin causing death, the prosecutor failed to present evidence that defendant delivered heroin to another person. With respect to the charge of delivery of less than 50 grams of heroin, defendant asserted that the prosecutor failed to present evidence that defendant delivered to Corson the heroin that caused Gregory's death. Following argument on the motion, the circuit court issued a written opinion, ruling in relevant part that defendant's actions did not constitute delivery of heroin to Corson under either statute. The circuit court concluded that the district court had abused its discretion in binding defendant over on the charges of delivery of heroin causing death and delivery of less than 50 grams of heroin.

II. THE ELEMENT OF DELIVERY

The prosecution argues that probable cause existed to bind defendant over on the charges of delivery of heroin causing death, MCL 750.317a, and delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*). MCL 750.317a provides:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code . . . that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.[4]

[4] MCL 750.317a became effective on January 1, 2006, and there are no reported decisions interpreting it.

As applied to this case, the plain language of MCL 750.317a indicates that a person is guilty of a felony if the person delivers heroin to another person, if that heroin is consumed by the person to whom it is delivered or by "any other person," and if, as a result, the person who consumes it dies. And, under MCL 333.7401(2)(a)(*iv*), a defendant is guilty if he or she delivers less than 50 grams of heroin to another.

The critical question presented by the prosecution in this case with regard to both statutes is whether the prosecution presented sufficient evidence to establish the element of delivery; that is, that defendant delivered the heroin to Corson. The prosecution maintains that defendant could be found guilty of delivering heroin to Corson on two theories: that defendant constructively delivered the heroin to Corson or that defendant aided and abetted the delivery of the heroin to Corson.

A. CONSTRUCTIVE DELIVERY

The prosecution asserts that defendant could be found guilty of constructively delivering heroin to Corson on the basis of evidence that he provided the transportation and the money used to procure the heroin.

The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *People v Williams,* 475 Mich 245, 250; 716 NW2d 208 (2006). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999).

The term "deliver" is not defined in the statute. The term is, however, defined in the Public Health Code, which is expressly referenced in MCL 750.317a, as follows:

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship. [MCL 333.7105(1).]

The record does not support the finding of either an actual or attempted transfer of heroin from defendant to Corson. The prosecution argues that defendant constructively delivered the heroin to Corson by providing the transportation to meet the drug dealer and by giving Corson the money used to purchase the heroin. The prosecution reasons that but for defendant's participation, Corson would not have possessed the heroin and thus could not have provided it to Gregory.

The term "constructive delivery" is not defined in either MCL 750.317a or the Public Health Code. Nor does Black's Law Dictionary define the term in any relevant manner. But, Black's Law Dictionary (8th ed), p 1535, defines "constructive transfer" as "a delivery of an item — [especially] a controlled substance — by someone other than the owner but at the owner's direction." The term "delivery" in the Public Health Code clearly equates with the term "transfer." Under this definition, a defendant constructively delivers a controlled substance when the defendant directs another person to convey the controlled substance under the defendant's direct or indirect control to a third person or entity. See, e.g., *Commonwealth v Murphy*, 577 Pa 275, 286; 844 A2d 1228 (2004) ("[A] defendant constructively transfers drugs when he directs another person to convey drugs under his control to a third person or entity."); *Dawson v State,* 812 SW2d 635, 637

(Tex App, 1991) (constructive delivery defined as "the transfer of a controlled substance either belonging to an individual or under his direct or indirect control by some other person at the instance or direction of the individual accused of such constructive transfer").

Here, the heroin purchased by Corson was not under defendant's control, nor did defendant direct the drug dealer to transfer the drugs to Corson. No evidence was presented that defendant had any discussions with the drug dealer regarding the delivery of the heroin to Corson on June 15, 2006. Corson's testimony established that defendant never had any control over the actual transfer between the drug dealer and Corson, nor did he ever have any control over the heroin that was sold to Corson for her use. Even assuming that the delivery from the drug dealer to Corson might not have occurred had defendant not transported Corson to Detroit and provided her with money, there was no evidence the defendant had any control over the heroin or that the drug dealer acted under defendant's direction. The evidence does not support a finding that defendant constructively delivered the heroin from the drug dealer to Corson.

B. AIDING AND ABETTING

The prosecution argues in the alternative that defendant could be convicted of delivering the heroin from the drug dealer to Corson under an aiding and abetting theory. The prosecution contends that defendant aided and abetted the delivery of the heroin from the drug dealer to Corson by providing Corson with transportation and the money used to purchase the heroin.

A defendant "who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante,* 246 Mich App 490, 495; 633 NW2d 18 (2001); MCL

767.39. "[T]he phrase 'aids and abets' is used to describe any type of assistance given to the perpetrator of the crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore,* 470 Mich 56, 63; 679 NW2d 41 (2004); see also *People v Wright,* 99 Mich App 801, 820; 298 NW2d 857 (1980).

Both MCL 750.317a and MCL 333.7401(2)(a)(*iv*) criminalize the actions of a person who "delivers" a controlled substance, not a person who "receives" a controlled substance. In this case, no evidence was presented to support a finding that defendant aided and abetted the drug dealer in delivering the drugs to Corson. Cf. *Izarraras-Placante, supra* (the defendant aided and abetted the delivery of the cocaine to an undercover police officer when he discussed the price of the cocaine with the drug dealer and drove the drug dealer to the site of the sale); *People v Lyons,* 70 Mich App 615, 618; 247 NW2d 314 (1976) (the defendant who "actively assisted" the drug dealer "by acting as a doorman or a 'lookout' " was guilty of aiding and abetting the delivery of the heroin); *People v Berry,* 101 Mich App 399, 402-403; 300 NW2d 575 (1981) (the defendant was properly bound over on "the theory of aiding and abetting the delivery of a controlled substance" where the evidence established that the "defendant arranged, assisted, and facilitated the delivery of cocaine"). While the evidence in this case could support a finding that defendant aided and abetted Corson in *receiving* the heroin, the evidence did not support a finding that defendant aided and abetted the drug dealer in *delivering* the heroin to Corson.

III. CONCLUSION

The evidence presented failed to establish a prima facie case for the element of delivery of heroin. There-

fore, the district court improperly bound defendant over for trial in the circuit court on the charges of delivery of a controlled substance causing death and delivery of less than 50 grams of heroin. Defendant did not constructively deliver the heroin to Corson because he did not have control of the heroin that was delivered to Corson, nor did he control the transfer of the heroin to Corson. Further, defendant did not aid and abet the delivery of heroin from the drug dealer to Corson. The circuit court properly quashed the district court's bindover on the charges of delivery of heroin causing death and delivery of less than 50 grams of heroin.

Affirmed.

BANDSTRA, J., concurred.

SCHUETTE, J. (*dissenting*). I respectfully dissent from the opinion of my distinguished colleagues in the majority, Judges FITZGERALD and BANDSTRA. I believe that there was sufficient evidence to support a conclusion that defendant aided and abetted the delivery of the heroin to Corson. Therefore, I would reverse and remand for further proceedings.

As noted by the majority, a defendant "who aids and abets the commission of a crime may be convicted and punished as if he directly committed the offense." *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001).

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that

> " '(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its

> commission at the time that [the defendant] gave aid and encouragement.' " [*People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (citations omitted).]

" 'An aider and abettor's state of mind may be inferred from all the facts and circumstances.' " *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Here, there was evidence that Harold Spencer delivered the heroin to Tracy Corson, i.e., that the crime was committed by "some other person." Defendant drove Corson to buy the heroin and gave her the money to do so. Thus, there is evidence that defendant "performed acts . . . that assisted the commission of the crime," i.e., he provided the buyer and the money. That same evidence shows that defendant intended the commission of the crime or knew that Spencer intended the crime at the time defendant gave aid. Thus, I believe that the trial court was incorrect in concluding that the bindover on the counts involving delivery of heroin was not proper under an aiding and abetting theory.

ATLANTIC XXXI, LLC v ART MIDWEST, LP

Docket No. 278104. Submitted December 9, 2008, at Detroit. Decided December 18, 2008, at 9:00 a.m. Leave to appeal sought.

Atlantic XXXI, LLC, brought an action in the Oakland Circuit Court against ART Midwest, LP, American Realty Trust, Inc., and others, seeking from American Realty Trust, a limited partner in a limited partnership organized under Texas law, payment pursuant to a guarantee. On cross-motions for summary disposition, the court, Edward Sosnick, J., applying Michigan law, granted summary disposition for American Realty Trust. In making its ruling, the court rejected American Realty Trust's contention that Texas law applied. Atlantic XXXI appealed.

The Court of Appeals *held*:

The trial court erred by not applying Texas law to this case. MCL 449.1901 provides that the law of the state under which a foreign limited partnership is organized governs its organization and internal affairs and the liability of its limited partners.

Reversed and remanded for reconsideration of the grant of summary disposition.

Siciliano Mychalowych Van Dusen and Feul, PLC (by *Andrew W. Mychalowych* and *Lindsay James*), for Atlantic XXXI, LLC.

Clark Hill PLC (by *Peter A. Jackson* and *Mark W. McInerney*) for American Realty Trust, Inc.

Before: MURPHY, P.J., and SAWYER and WHITBECK, JJ.

SAWYER, J. In this case, we must resolve whether a claim that seeks to impose liability on a limited partner of a limited partnership organized under foreign law must be resolved by applying Michigan law or the law of the foreign jurisdiction. We hold

that, without regard to the underlying basis for the claim of liability, the law of the jurisdiction under which the partnership is organized controls the resolution of the issue of liability.

This case arises out of a commercial real estate transaction involving multiple related entities. Defendant ART Midwest, LP (the Limited Partnership), is a limited partnership organized under the laws of the state of Texas. Defendant American Realty Trust, Inc. (defendant), is a limited partner in that partnership. The Limited Partnership is the sole member of a limited liability company, ART Concord East, LLC (the LLC). The LLC, which is not a party to this action, purchased an apartment complex. In doing so, it assumed responsibility for a multimillion dollar loan owed to plaintiff. Additionally, as part of the transaction, the Limited Partnership guaranteed payment of the debt.

Subsequently, the loan went into default and the Limited Partnership failed to pay under the guarantee. That precipitated the instant action, which includes a claim against defendant in which plaintiff alleged that defendant was a mere alter ego of the Limited Partnership and, therefore, should be held liable for the debt. The parties brought cross-motions for summary disposition. The primary issue resolved below was whether a claim of alter ego or piercing the veil required the showing of a fraud or wrong. Plaintiff argued that no such showing was required. Defendant, on the other hand, argued that such a showing was required. Additionally, defendant argued that, because plaintiff sought to impose liability on a limited partner of a partnership formed under Texas law, Texas law controlled and would not impose liability in this case. The trial court rejected the application of Texas law, but did hold that

Michigan law required a showing of fraud or other wrongdoing and granted summary disposition in favor of defendant on this claim.

We granted plaintiff's application for leave to appeal.

We decline to address the issue raised by plaintiff: whether the trial court erred in holding that Michigan law requires the showing of a fraud or wrong and that no such showing was made in this case. Rather, we agree with defendant that this matter must be resolved under Texas law, not Michigan law.

MCL 449.1901 provides in pertinent part that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." The trial court rejected the argument that this statute requires that this case be resolved under Texas law because it involves a claim under an alter ego theory:

> The Court agrees with the plaintiff that if the defendants were being sued as limited partners of the Texas limited partnership, their liability as limited partners would be determined by the Texas statutes governing limited partnerships. The defendants are not being sued as limited partners but under an alter ego theory. Since this claim does not relate to the lawful organization of the limited partnership, but is more akin to a business tort, application of Texas law is not required. Accordingly, the Court need not address whether the defendant's argument that the plaintiff failed to allege fraud [is] necessary for an alter ego claim under Texas law.

We disagree with the trial court.

Questions of statutory construction are reviewed de novo.[1] Where the statute is clear and unambiguous, the statute is to be enforced as written without the need for

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[1] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).

further interpretation.[2] MCL 449.1901 is clear and unambiguous. The liability of limited partners is to be determined by the laws of the state under which the partnership is organized. The statute draws no distinction based on the theory upon which liability is to be imposed. This case involves a question regarding the liability to be imposed on a limited partner. The partnership was formed under Texas law. Therefore, Texas law controls the determination of the limited partner's liability.

Defendant goes on to suggest that we should affirm the trial court on the basis that, in light of the proper application of Texas law, defendant was still entitled to summary disposition. While that may very well be true, we decline to resolve the issue whether Texas law favors defendant's position because the trial court did not rule on the substantive application of Texas law to this issue. The trial court should be provided the initial opportunity to apply Texas law and determine whether defendant is entitled to summary disposition.

Accordingly, we reverse the trial court's grant of summary disposition in favor of defendant and remand the matter to the trial court to reconsider the grant of summary disposition in light of this opinion and in light of the applicable Texas law. We do not retain jurisdiction. No costs, neither party having prevailed in full.

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[2] *Id.* at 63.

PEOPLE v CROSS

Docket No. 280652. Submitted November 11, 2008, at Lansing. Decided December 18, 2008, at 9:05 a.m. Leave to appeal sought.

The Genesee Circuit Court, Judith A. Fullerton, J., ordered Clifton D. Cross, after he was convicted of attempted embezzlement of $1,000 but less than $20,000, to pay $123,180 in restitution for income loss. Cross appealed by delayed leave granted.

The Court of Appeals *held*:

The trial court did not abuse its discretion by ordering restitution.

1. Crime victims have both statutory and constitutional rights to restitution, Const 1963, art 1, § 24; MCL 780.766, and the Crime Victim's Rights Act, MCL 780.766(2), mandates that a defendant make full restitution to any victim of the defendant's course of conduct. A court may order restitution for lost income when the loss is supported by the evidence.

2. As required by MCL 780.767(4), the trial court resolved the dispute regarding the proper amount of restitution after the prosecution met its burden of demonstrating by a preponderance of the evidence the amount of the loss sustained by the victim.

Affirmed.

Michael A. Cox, Attorney General, *B. Eric Restuccia*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, *Donald A. Kuebler*, Chief, Research, Training, and Appeals, and *Vikki Bayeh Haley*, Assistant Prosecuting Attorney, for the people.

Sheila R. Deming for the defendant.

Before: MURRAY, P.J., and MARKEY and WILDER, JJ.

PER CURIAM. Defendant appeals by delayed leave granted his sentence for attempted embezzlement of

$1,000 or more but less than $20,000, MCL 750.174(4)(a). The trial court sentenced defendant to three years' probation, with the first 90 days to be served in jail. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred by ordering him to pay restitution in the amount of $123,180. We disagree. Defendant contends that the trial court lacked statutory authority to order restitution for income loss. Because defendant raises this argument for the first time on appeal, we review defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Under the plain error rule, defendant[] must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). Defendant has the burden of persuasion. *Id*.

Defendant argues that no statutory authority explicitly permitted the trial court to order restitution for income loss. He wrongly relies on *People v Shanks*, unpublished memorandum opinion of the Court of Appeals, issued July 26, 1996 (Docket No. 178365), to buttress his argument. An unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1). In contrast, a published opinion of this Court has precedential effect under the rule of stare decisis. MCR 7.215(C)(2). At least one published opinion of this Court negates defendant's argument. In *People v Guajardo*, 213 Mich App 198; 539 NW2d 570 (1995), this Court held that because the restitution statute is silent regarding how to determine the amount of loss that the victim sustained, the amount should be "based upon the evidence." *Id.* at 200. This Court also

determined that if the evidence demonstrated loss based on both the replacement value of the stolen items and expected profits, then the trial court may consider lost profits in assessing restitution. *Id*. Further, defendant's reliance on the maxim *expressio unius est exclusio alterius* with respect to MCL 769.1 is misplaced. Under *Guajardo*, the trial court was permitted to order restitution for lost profits under MCL 780.767; consequently, defendant has not established plain error.

Defendant next contends that the prosecutor did not prove by a preponderance of the evidence that $123,180 was the amount that the victim lost. This Court reviews a restitution order for an abuse of discretion. *People v Gubachy*, 272 Mich App 706, 708; 728 NW2d 891 (2006). Generally, an appellate court defers to the trial court's judgment, and if the trial court's decision falls within the range of principled outcomes, it has not abused its discretion. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). When the question of restitution involves a matter of statutory interpretation, this Court reviews the matter de novo. *Gubachy*, *supra* at 708.

Crime victims retain both statutory and constitutional rights to restitution. Const 1963, art 1, § 24; MCL 780.766; *People v Grant*, 455 Mich 221, 229; 565 NW2d 389 (1997). Further, the Crime Victim's Rights Act, MCL 780.766(2), mandates that a defendant "make *full restitution* to any victim of the defendant's course of conduct . . . ." (Emphasis added.) To prove the appropriate amount of restitution, MCL 780.767(4) requires:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

"Preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. *People v Pugh*, 48 Mich App 242, 245; 210 NW2d 376 (1973). The prosecutor presented evidence, including the victim's extensive, essentially expert, testimony, that defendant embezzled $123,180. While defendant disagrees with this amount, he did not provide any evidence to contradict it. Weighing the prosecutor's evidence against the defendant's lack of countering evidence, the trial court resolved the dispute, determining that the amount suggested by the prosecutor had more convincing force and the greater probability of truth. *Pugh, supra* at 245. Because the trial court's decision did not fall outside the range of principled outcomes, the trial court did not abuse its discretion. *Carnicom, supra* at 616-617.

We affirm.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Court of general interest to the bench and bar of the state.

Order Entered December 18, 2008:

ROBERTS v TITAN INSURANCE COMPANY, Docket No. 280776. The Court orders that a special panel shall not be convened pursuant to MCR 7.215(J) to resolve the conflict between this case and *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244; 570 NW2d 304 (1997).

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DUE PROCESS

2. A developer does not always have a protected property interest in a particular outcome of land-use planning; the rejection of development projects and refusals to issue building permits do not ordinarily implicate substantive due process even where governmental officials have violated state laws or administrative procedures; substantive due process prevents governmental power from being used for purposes of oppression, or abuse of governmental power that shocks the conscience, or action that is legally irrational in that it is not suffi-

ciently keyed to any legitimate state interest. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184.

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1. To aid and abet the commission of a crime is to give any

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2. The Self-Defense Act applies prospectively only to offenses committed on or after October 1, 2006 (MCL 780.971 *et seq*.). *People v Conyer*, 281 Mich App 526.

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3. A person convicted of committing the abominable and detestable crime against nature with an animal, bestiality, is not required to register as a sex offender under the Sex Offenders Registration Act (MCL 28.722(e)(*ii*), 750.158). *People v Haynes*, 281 Mich App 27.

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owned motor vehicle (MCL 500.3135, 691.1405). *Allen v Bloomfield Hills School Dist*, 281 Mich App 49.

2. A governmental agency is liable for bodily injury or property damage resulting from the negligent operation by an agency employee of an agency-owned motor vehicle; bodily injury is a physical or corporeal injury to the body; the brain is part of the body and it can be injured physically through direct or indirect trauma (MCL 691.1405). *Allen v Bloomfield Hills School Dist*, 281 Mich App 49.

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2. An insurer who seeks to cut off its responsibility under a liability insurance policy on the ground that its insured did not comply with a provision in the policy that requires notice of an occurrence to which the policy may apply immediately or within a reasonable time must establish actual prejudice to its position. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429.

3. An insured that, in response to governmental demands that are the equivalent of a lawsuit, enters into stipulations and consent decrees with governmental agencies for remedial action regarding environmental damage without informing its insurer may be found to violate an insurance policy clause prohibiting "voluntary" payments or the assumption of obligations without the insurer's consent if the insured had other options available to it under the terms of the policy, such as demanding that the insurer participate in the matter or provide a defense; an insurer may seek enforcement of a volun-

tary payment provision without showing that its rights were actually prejudiced. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429.

NO-FAULT

4. The proper inquiry when considering whether attorney fees are warranted under the no-fault act for the unreasonable refusal or delay in making proper payment of personal protection insurance benefits is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable; delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty (MCL 500.3148[1]). *Bonkowski v Allstate Ins Co*, 281 Mich App 154.
5. The 12 percent penalty interest allowed by the no-fault act for overdue personal protection insurance benefits may not be applied to provide interest on the judgment in addition to the judgment interest allowed by the Revised Judicature Act (MCL 500.3142, 600.6013). *Bonkowski v Allstate Ins Co*, 281 Mich App 154.
6. *Manier v MIC Gen Ins Corp*, 281 Mich App 485.
7. There may be more than one "owner" of a vehicle for purposes of applying the no-fault automobile insurance act's definition of "owner" (MCL 500.3101[2][h]). *Roberts v Titan Ins Co*, 281 Mich App 551.
8. The phrase "having the use" of a motor vehicle for purposes of defining "owner" under the no-fault automobile insurance act means using the vehicle in ways that comport with concepts of ownership; the focus is on the nature of the person's right to use the vehicle; ownership follows from proprietary or possessory usage, as opposed to merely incidental usage under the direction or with the permission of another; it is a regular pattern of unsupervised usage (MCL 500.3101[2][h]). *Roberts v Titan Ins Co*, 281 Mich App 551.
9. A no-fault insurer is liable to pay personal protection insurance benefits only to the extent that the benefits claimed are causally connected to the accidental bodily injury arising out of the automobile accident; in the case of items for which expenses would have been incurred even in the absence of the accident and resulting injury, a court must determine what portion is causally connected to the injury and allocate not the portion of the

expenses attributable to the injured person's usage, but the portion attributable to the injured person's usage that is occurring only because of the injury (MCL 500.3105[1], 500.3107[1][a]). *Hoover v Michigan Mut Ins Co*, 281 Mich App 617.

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1. Res judicata under federal law precludes a subsequent lawsuit where four elements are present: first, there must be a final decision on the merits by a court of competent jurisdiction, second, the subsequent action must be between the same parties or their privies, third, there is an issue in the subsequent action that was or should have been litigated in the prior action, and fourth, there must be an identity of the causes of action. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678.
2. An application of the doctrine of res judicata may be grounded on earlier bankruptcy proceedings. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678.
3. A bankruptcy order that entirely resolves all the issues pertaining to a claim will satisfy the res judicata requirement of a final judgment. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678.
4. If a party had a full and fair opportunity to litigate a claim in the bankruptcy court but chose not to do so, federal res judicata law bars litigating that claim in a state court. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678.
5. The element of federal res judicata law requiring identity of the prior and subsequent causes of action is satisfied if the claims arose out of the same transaction or series of transactions, or where the claims arose out of the same core operative facts; courts must compare the substance of the actions, not their form, in determining whether the causes of action are the same; identity of causes of action means an identity of the facts creating the right of action and of the evidence necessary to sustain each action. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678.

JUST COMPENSATION—*See*

NUISANCE 1

LACHES—*See*

LIMITATION OF ACTIONS 2

LIABILITY INSURANCE—*See*

INSURANCE 2, 3

LIENS

REAL PROPERTY

1. A court may not impose a lien on real property for the purpose of securing the amount incurred to abate a general public nuisance; costs incurred to abate a general public nuisance must be collected in the same manner as damages and costs are generally collected on execution (MCL 600.2940[4], 600.6001 *et seq*.). *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251.
2. A receiver is not entitled to a foreclosable lien in the amount of its outstanding fees and compensation; a judgment for unpaid fees and compensation due a receiver must be collected in the same manner as damages and costs are generally collected on execution (MCL 600.6001 *et seq*.). *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251.

LIMITATION OF ACTIONS

See, also, MECHANICS' LIENS 2

DECLARATORY JUDGMENTS

1. A statute of limitations that bars the granting of relief on the plaintiff's underlying substantive claim also bars the same claim when stated as one seeking declaratory relief. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429.

INSURANCE

2. An insured's breach of a condition in an insurance policy requiring the insured to give the insurer notice of an occurrence to which the policy may apply or notice of subsequent claims, suits, demands, or other process, when combined with the insured's inexcusable delay of longer than the statutory limitations period before filing a suit for a claim under the policy, may provide exceptional circumstances or compelling equities for the doc-

trine of laches to bar the insured's claim. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429.

LIMITED GUARDIANSHIP PLACEMENT PLAN NONCOMPLIANCE—*See*

PARENT AND CHILD 3

LIMITED PARTNERSHIPS—*See*

PARTNERSHIP 1

LOSS OF SERVICES—*See*

TORTS 2

MECHANICS' LIENS

CONSTRUCTION LIENS

1. The burden of proof is on a plaintiff to show compliance with statutory requirements necessary to establish a right of action to enforce a mechanic's lien; proceedings for the enforcement of a construction lien shall not be brought later than one year after the date on which the claim of lien was recorded; each person having an interest in the property shall be made a party to the action; until a lienholder files a cross-claim and notice of lis pendens in a pending suit, he or she has not begun the proceedings for the enforcement of the lien (MCL 570.1117). *Church & Church v A-1 Carpentry*, 281 Mich App 330.
2. A subcontractor, supplier, or laborer who seeks enforcement of a construction lien on a residential structure through foreclosure must join the Homeowner Construction Lien Recovery Fund in the foreclosure action within the period provided in MCL 570.1117(1) or be barred from recovery from the fund under the terms of the Construction Lien Act; proceedings for the enforcement of a construction lien and the foreclosure of any interest in the subject of the construction lien pursuant to 570.1117(1) shall not be brought later than one year after the date the claim of lien was recorded (MCL 570.1203[4]). *Church & Church v A-1 Carpentry*, 281 Mich App 330.

MEDICAL MALPRACTICE—*See*

HEALTH 1

NEGLIGENCE 1

MERGER DOCTRINE—*See*

DEEDS 2

MISREPRESENTATION BY INSURANCE APPLICANTS—*See*

INSURANCE 6

MODIFICATION OF CHILD SUPPORT AWARDS—*See*

PARENT AND CHILD 2

MORTGAGES

ELECTION OF REMEDIES

1. A mortgagee may not pursue statutory foreclosure through advertisement with regard to a mortgage debt while at the same time maintaining a lawsuit for judicial foreclosure of the same mortgage debt; two mortgagees pursuing two different mortgages on the same property are not precluded from one pursuing judicial foreclosure and the other simultaneously pursuing statutory foreclosure (MCL 600.3105[2], 600.3204). *Church & Church v A-1 Carpentry*, 281 Mich App 330.

FORECLOSURES

2. A lender that bids at a foreclosure sale is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it; if the credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of the foreclosure, it is a full credit bid; a full credit bid by a mortgagee satisfies the mortgage debt and extinguishes the mortgage. *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63.

NOTICE OF DEFECTS IN TITLE

3. A conveyance of real estate that is not recorded as required by statute is void as against any subsequent purchaser in good faith and for a valuable consideration; a person takes in good faith if he or she takes without notice, actual or constructive, of a defect in the vendor's title; a person having knowledge of such facts as would lead an honest person, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate and who fails to make such inquiries is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed (MCL 565.29). *Church & Church v A-1 Carpentry*, 281 Mich App 330.

MOTOR-VEHICLE EXCEPTION—*See*

GOVERNMENTAL IMMUNITY 1, 2

MUTUAL MISTAKE—*See*

DEEDS 3

NEGLIGENCE

MEDICAL MALPRACTICE

1. *Snyder v Advantage Health Physicians*, 281 Mich App 493.

PREMISES LIABILITY

2. A premises possessor is generally not required to protect an invitee from open and obvious dangers; black ice, an invisible or nearly invisible coating of ice on a paved surface, if it is not visible upon casual inspection or if it is without other indicia of a potentially hazardous condition, is not an open and obvious danger. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474.

NO-CONTEST PROVISIONS—*See*

TRUSTS 1

NO-FAULT—*See*

INSURANCE 4, 5, 6, 7, 8, 9

NO-FAULT ACT—*See*

GOVERNMENTAL IMMUNITY 1

NONPARTIES AT FAULT—*See*

NEGLIGENCE 1

NOTICE OF DEFECTS IN TITLE—*See*

MORTGAGES 3

NOTICE TO INSURERS OF OCCURRENCES—*See*

INSURANCE 2

NUISANCE

See, also, LIENS 1

ABATEMENT OF NUISANCES

1. The exercise of legitimate police power to abate a public nuisance is an exception to the constitutional prohibition against taking private property for public use

without just compensation (US Const, Am V; Const 1963, art 10, § 2). *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251.

OFFENSE VARIABLES—*See*

SENTENCES 2

OFFER AND ACCEPTANCE—*See*

CONTRACTS 1

OPEN AND OBVIOUS DANGERS—*See*

NEGLIGENCE 2

OPTIONS TO LEASE—*See*

VENDOR AND PURCHASER 1

ORDINANCES—*See*

ZONING 2

OUTSTANDING WARRANTS—*See*

SEARCHES AND SEIZURES 1

OVERDUE PAYMENTS—*See*

INSURANCE 5

OWNERS OF MOTOR VEHICLES—*See*

INSURANCE 7, 8

PARENT AND CHILD

CHILD PROTECTIVE PROCEEDINGS

1. To support the adjournment of a trial or hearing in a child protective proceeding for good cause, there must be a showing of a legally sufficient or substantial reason for the adjournment (MCR 3.923[G]). *In re Utrera*, 281 Mich App 1.

CHILD SUPPORT

2. An agreement that enhances a parent's child support obligation beyond the minimum amount required under the child support formula should be enforced absent a compelling reason to forbear enforcement. *Holmes v Holmes*, 281 Mich App 575.

TERMINATION OF PARENTAL RIGHTS

3. The phrase "good cause," in the provision that allows

the termination of parental rights for failure to substantially comply with a limited guardianship plan without good cause, means "without a legally sufficient or substantial reason" (MCL 712A.19b[3][d]). *In re Utrera*, 281 Mich App 1.

4. No termination of parental rights to an American-Indian child may be ordered unless a court determines beyond a reasonable doubt that continued custody of the child by an Indian parent is likely to result in serious emotional or physical damage to the child and determines by clear and convincing evidence that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts proved unsuccessful (25 USC 1912[d], [f]). *In re Roe*, 281 Mich App 88.
5. Active efforts at culturally relevant remedial services and rehabilitative programs designed to prevent the breakup of an Indian family, which efforts are required before parental rights to an Indian child may be terminated, may be shown by evidence that past efforts have met with no success or by evidence that the provision of future services and programs would be futile (25 USC 1912[d]). *In re Roe*, 281 Mich App 88.
6. *In re Jenks*, 281 Mich App 514.

PARTIES—*See*

BANKRUPTCY 1

PARTNERSHIP

LIMITED PARTNERSHIPS

1. *Atlantic XXXI, LLC v Art Midwest, LP*, 281 Mich App 733.

PAYMENT OF WAGES AND FRINGE BENEFITS ACT—*See*

ADMINISTRATIVE LAW 1

PENALTY INTEREST—*See*

INSURANCE 5

PERPETUITIES—*See*

TRUSTS 2

PERSONAL PROTECTION INSURANCE BENEFITS—*See*

INSURANCE 4, 5, 9

POLICE POWERS—*See*

NUISANCE 1

POWER SUPPLY COST RECOVERY PLANS—*See*

PUBLIC UTILITIES 1

PREDATORY CONDUCT—*See*

SENTENCES 2

PREJUDICE TO INSURERS—*See*

INSURANCE 2, 3

PREMISES LIABILITY—*See*

NEGLIGENCE 2

PRICE OF PROPERTY FOR USE TAX ASSESSMENTS—*See*

TAXATION 2

PRINCIPAL CONTRACTORS—*See*

BONDS 1

PROPERTY DEVELOPMENT—*See*

CONSTITUTIONAL LAW 2

PROTECTIVE ORDERS—*See*

HEALTH 1

PUBLIC SERVICE COMMISSION—*See*

PUBLIC UTILITIES 2

PUBLIC UTILITIES

POWER SUPPLY COST RECOVERY PLANS

1. The Public Service Commission need not require a public utility to include in a power supply cost recovery request an integrated resource plan or a demand-side management program; the commission must generally review the reasonableness and prudence of utilities' power supply cost recovery plans but is not bound by

any single formula or method and need not require any specific programs intended to promote conservation, energy efficiency, or demand-side management (MCL 460.6j). *In re Application of Consumers Energy Co*, 281 Mich App 352.

PUBLIC SERVICE COMMISSION

2. The Public Service Commission may, within its general ratemaking powers, adopt a ratemaking formula that includes an equalization mechanism designed to ensure, to the extent possible, that the amount of a public utility's uncollectible expense attributable to unpaid ratepayers' utility bills for a calendar year matches the amount estimated by the Public Service Commission in setting the rates for that year; an equalization mechanism that defers the excess expense to a future year and that deems such expense to be an expense of the year to which it is deferred collects such expense on a prospective, not a retroactive, basis and is not retroactive ratemaking. *In re Application of Michigan Consolidated Gas Co*, 281 Mich App 545.

PUBLIC WORKS—*See*

BONDS 1

RATEMAKING AUTHORITY—*See*

PUBLIC UTILITIES 2

REAL PROPERTY—*See*

LIENS 1, 2

RECEIVERS—*See*

LIENS 2

REFORMATION OF DEEDS—*See*

DEEDS 1, 2, 3

REFORMATION OF INSURANCE POLICIES—*See*

INSURANCE 6

REFUSAL TO PAY OR DELAY IN PAYING INSURANCE BENEFITS—*See*

INSURANCE 4

REMEDIAL SERVICES AND REHABILITATIVE PROGRAMS—*See*

PARENT AND CHILD 5

RES JUDICATA—*See*

BANKRUPTCY 1

JUDGMENTS 1, 2, 3, 4, 5

RESTITUTION—*See*

SENTENCES 1

RETROACTIVE APPLICATION OF INDEMNITY PROVISIONS—*See*

INDEMNITY 1

RETROACTIVE AWARDS OF BENEFITS IN ARBITRATION—*See*

ARBITRATION 1

ROLLING STOCK USED IN INTERSTATE COMMERCE—*See*

TAXATION 1

SCHOOL DENIAL PERIODS—*See*

UNEMPLOYMENT COMPENSATION 1

SCHOOLS—*See*

UNEMPLOYMENT COMPENSATION 1

SEARCHES AND SEIZURES

ILLEGAL ARREST

1. The discovery of an outstanding arrest warrant after an illegal arrest can dissipate or attenuate the taint of the initial illegal arrest so as to make admissible any incriminating evidence that is discovered in a proper search incident to the lawful arrest pursuant to the warrant (US Const, Am IV; Const 1963, art 1, § 11). *People v Reese*, 281 Mich App 290.

SELF-DEFENSE—*See*

CRIMINAL LAW 2

SENTENCES

RESTITUTION

1. *People v Cross*, 281 Mich App 737.

SENTENCING GUIDELINES

2. No points may be assessed for offense variable 10 of the sentencing guidelines (exploitation of a vulnerable victim) if no vulnerable victim was in fact placed in jeopardy or exploited by the offender's actions, regardless of the offender's subjective intent (MCL 777.40). *People v Russell (On Remand)*, 281 Mich App 610.

SENTENCING GUIDELINES—*See*

SENTENCES 2

SERIOUS IMPAIRMENT OF BODY FUNCTION—*See*

GOVERNMENTAL IMMUNITY 1

SEX OFFENDERS REGISTRATION ACT—*See*

CRIMINAL LAW 3

SEXUAL ABUSE—*See*

PARENT AND CHILD 6

SOCIAL SECURITY NUMBERS—*See*

CONSTITUTIONAL LAW 3

SPENDING CLAUSE—*See*

CONSTITUTIONAL LAW 3

STATUTES—*See*

CRIMINAL LAW 2

STATUTORY GROUNDS FOR TERMINATION OF PARENTAL RIGHTS—*See*

PARENT AND CHILD 3

SUBSTANTIVE DUE PROCESS—*See*

CONSTITUTIONAL LAW 2

TAKINGS—*See*

NUISANCE 1

TAXATION

USE TAX

1. Trucks purchased, rented, or leased outside Michigan but used exclusively in Michigan for interstate com-

merce qualify for a use-tax exemption so long as they carry persons or property originating from, or destined for, another state; such trucks need not cross state lines to qualify for the exemption (MCL 205.94k[2], now MCL 205.94k[4]). *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35.

2. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132.

TENTH AMENDMENT—*See*

CONSTITUTIONAL LAW 3

TERMINATION OF PARENTAL RIGHTS—*See*

PARENT AND CHILD 3, 4, 5, 6

THIRD PARTIES—*See*

INSURANCE 1

TORTS

WRONGFUL DEATH

1. The wrongful death act permits an award of any type of damages, economic or noneconomic, deemed justified by the facts; the act provides specific examples of the types of damages available, not an exhaustive list of the damages available (MCL 600.2922[6]). *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644.
2. Damages for loss of services may be awarded under the wrongful death act; such damages are economic damages that are separate and distinguishable from compensation for the loss of society and companionship or for loss of consortium; economic damages for loss of services are not subject to the cap on damages for noneconomic loss applicable to wrongful death actions based on medical malpractice (MCL 600.1483[1]; MCL 600.2922[6]). *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644.

TRUSTS

CONTESTING TRUSTS

1. A no-contest, or *in terrorem*, provision in a trust agreement is unenforceable if probable cause exists for challenging the trust. *In re Mary E Griffin Revocable Grantor Trust*, 281 Mich App 532.

PERPETUITIES

2. A trust is invalid if it violates the rule against perpetuities (MCL 554.72). *In re Mary E Griffin Revocable Grantor Trust*, 281 Mich App 532.

UNEMPLOYMENT COMPENSATION

SCHOOLS

1. *Petrelius v Houghton-Portage Schools*, 281 Mich App 520.

UNILATERAL MISTAKE—*See*

DEEDS 3

USE OF A MOTOR VEHICLE—*See*

INSURANCE 8

USE OF PROPERTY FOR TAX ASSESSMENTS—*See*

TAXATION 2

USE TAX—*See*

TAXATION 1, 2

VENDOR AND PURCHASER

OPTIONS TO LEASE

1. An option to lease does not transfer an interest in land until the option is exercised; a person who discovers that there are restrictions applicable to land after receiving an option to lease the land but before exercising the option is not, after exercising the option, a purchaser in good faith without notice of the restrictions. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364.

VICTIMS OF CRIMES—*See*

SENTENCES 1, 2

VOLUNTARY PAYMENTS BY INSURED—*See*

INSURANCE 3

VULNERABLE VICTIMS—*See*

SENTENCES 2

WORDS AND PHRASES—*See*

INSURANCE 7, 8

MORTGAGES 3

PARENT AND CHILD 3

TAXATION 2

WRONGFUL DEATH—*See*

TORTS 1, 2

ZONING

See, also, CONSTITUTIONAL LAW 2

CHURCHES

1. A building is a church, for zoning purposes, if it is used for public worship and activities or uses that are reasonably closely related in substance and in space to the public-worship use. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396.

ORDINANCES

2. A court should generally apply the version of a zoning ordinance that was in effect at the time of the zoning decision, but an exception exists with respect to the application of an amended ordinance if the amendment was enacted in bad faith; among the factors to consider in determining whether there was bad faith is whether the amendment was intended to provide clarification or whether the amendment was enacted for the purpose of manufacturing a reason to deny an application for a permit or variance. *Great Lakes Society v Georgetown Charter Twp*, 281 Mich App 396.